SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

Nos. 14 and 15.

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS, Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation, Respondents.

PETITIONERS' BRIEF.

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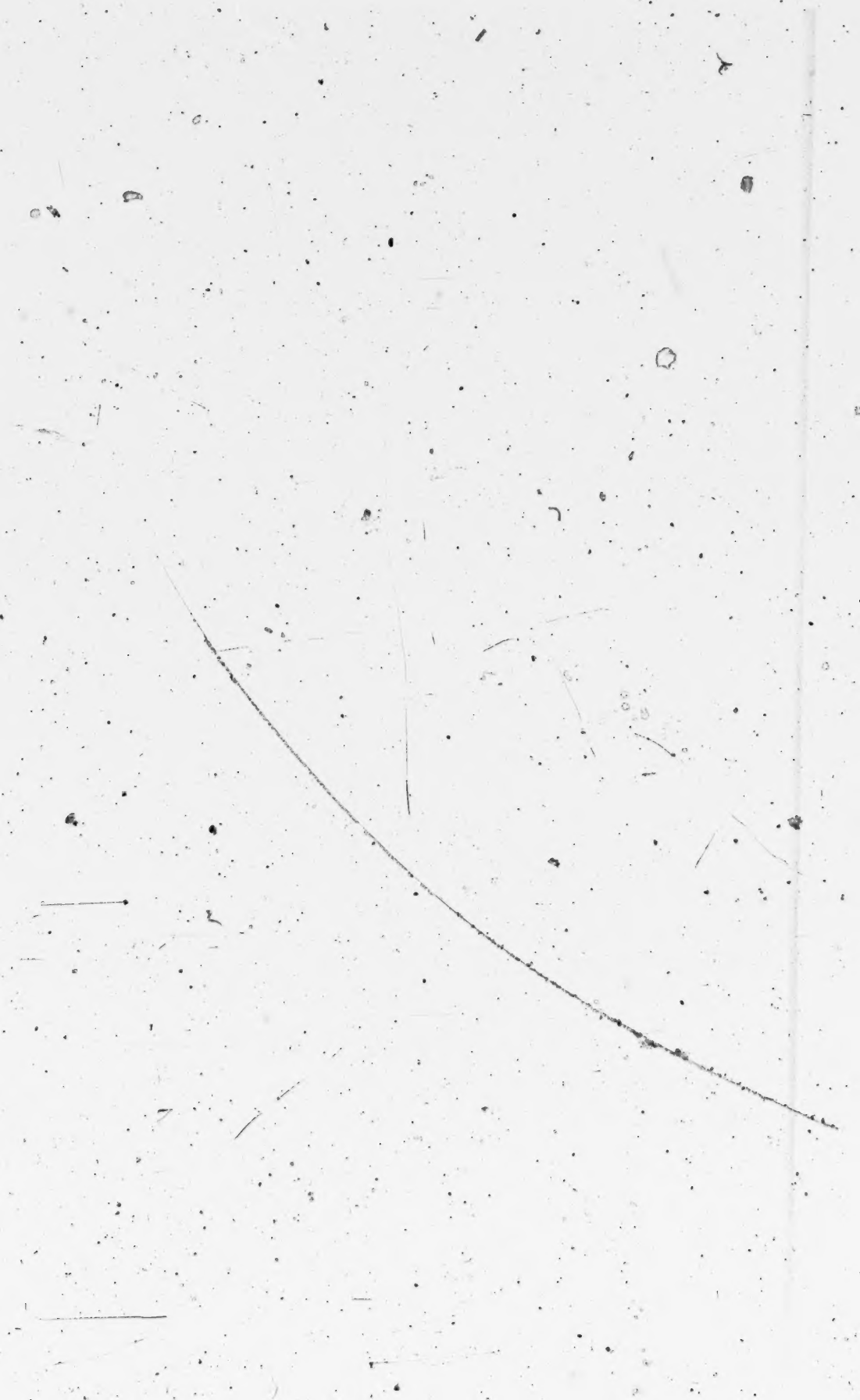

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PETITIONERS' BRIEF.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 250 Wis. 550, 27 N. W. (2) 875 (R. 106-121).

STATEMENT AS TO JURISDICTION.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1925, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the

validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution. * * *."

In this case the validity of the Statutes of the State of Wisconsin, to-wit: Sections 111.01 through 111.19, Wisconsin Statutes 1945, particularly 111.06 (2) (e) and (h), and a direction to enter judgment enforcing an order which is purportedly based on such statutes, is drawn into question upon the ground that such statutes, order and judgment on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to, and in violation of, rights conferred and duties imposed by superior federal legislation, to-wit: the National Labor Relations Act, 49 Stats. 449, U. S. C. tit. 29, Para. 151-166, and the Labor Management Relations Act of 1947, Act of Congress June 23, 1947, c. 120, Public Law 101, Eightieth Congress, First Session (61 Stat. 136); Section 1 of the Thirteenth Amendment to the Constitution of the United States, in that they impose involuntary servitude; and Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty or property without due process of law, deprive petitioners of the equal protection of the laws, and more particularly deny to the Petitioners freedom of speech and assembly.

The decision of the Wisconsin Supreme Court was in favor of the validity of the statutes and order. The Supreme Court of the State of Wisconsin rendered its decision herein on June 10, 1947, and denied a motion for rehearing on the 9th day of September, 1947.

Said opinion of the Supreme Court of the State of Wisconsin, the last resort of all causes in the State of Wisconsin, is officially reported in 250 Wis. 550, 27 N. W. (2) 875 (R. 106-121).

Petitioners argued before the Wisconsin Employment Relations Board (R. 30-31), before the Circuit Court of Milwaukee County (R. 21-22; 90-94), and before the Supreme Court of the State of Wisconsin (see Decision, R. 106-121); that Section 111.04 and Section 111.06 (2) (e) and (h) of the Wisconsin Statutes, and the order of the Board based on the Wisconsin Statutes, as construed, were unconstitutional, void, and of no effect whatsoever for the reasons previously set forth herein.

The Federal question of whether the Wisconsin Statutes in question and the order and judgment purportedly based on such statutes violated the Constitution of the United States thus was raised before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconson specifically held that neither the Wisconsin Statutes nor the order based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the provisions of the Constitution of the United States.

Thus the Wisconsin Supreme Court has taken the position that mere work stoppages in connection with a labor dispute, but not associated with any violence, boycotting, or picketing, are validly restrained by the order and judgment herein; that such restraints are supported by the provisions of Chapter 111, Wisconsin Statutes 1945, and that the question of the violation of constitutional guarantees alleged by the petitioners to have been breached by the order should be determined adversely to the petitioners.

STATEMENT OF THE CASE.

This case involves the right of employees to withhold their services for periods of one day or less, and at irregular intervals of time, either by peacefully leaving their employer's premises or by refusing to enter upon such premises, and by attending union meetings during such stoppages, all for the purpose of attaining lawful collective bargaining demands.

The Briggs & Stratton Corporation (hereinafter referred to as the "Company") operates two manufacturing plants (hereinafter referred to as the East and West plants) in Milwaukee, Wisconsin, and engages the services of approximately 2000 employees for hire in the State of Wisconsin (R. 33). The International Union, United Automobile Workers of America, A. F. of L., Local 232 (hereinafter called the "Union"), represents the production workers of the Company as their collective bargaining agent having been duly certified as such in March, 1938, by the National Labor Relations Board under the provisions of the National Labor Relations Act, (Findings of Fact, No. 4, R. 15; R. 33, 40).

Following such certification the Company and the Union entered into various collective bargaining agreements, the last of which expired on July 1, 1944 (Finding of Fact No. 4, R. 15; R. 34). Because the parties could not agree upon the terms of a new agreement the dispute was submitted to the National War Labor Board in June, 1944, under authority of the War Labor Disputes Act of 1943, 57 Stat. 163, 50 U. S. C. Par. 1501, 1508, and Executive Order No. 9017; the National War Labor Board entered its order on December 20, 1945 directing the Company to put into effect certain wages and working conditions requested by the union; from the time of the entry of the Directive Order of the National War Labor Board until

the hearing before the Wisconsin Employment Relations Board (hereinafter referred to as the State Board) in the present proceedings, the Company made no effort to comply with any of the terms of such order, although the Union sought to induce the Company to do so (R. 19 [Board's Decision], 34, 43.) The company had previously refused to comply with the recommendation of a tri-partite panel, and with a directive of the Regional War Labor Board (R. 34). The issues before the War Labor Board covered maintenance of membership, check-off, vacations, wages and similar items (R. 35, 43).

After V-J Day, August 15, 1945 the Union raised new demands relating primarily to wages; and bargaining sessions continued down to the date of the hearing before the Wisconsin Employment Relations Board (R. 35).

On November 3, 1945 at a special meeting of the members of the Union and after discussion of the apparent stalemate of the negotiations between the Union and Company, a motion was unanimously passed empowering the Executive Board of the Union to call a special meeting during working hours at any time as such Board saw fit (R. 47-48). This action was taken by voice vote. The membership is the highest authority of the Union, and it is the duty of the officers to carry out the directions and desires of the members (R. 44).

Subsequently, a number of such stoppages for the purpose of attending union meetings were called from time to time. The first one occurred on November 6, 1945; no advance notice was given to the Company prior to such stoppages; stoppages occurred usually during the first shift, which operated at the East plant from 8 A. M. to 5 P. M., and at the West plant from 7 A. M. to 3:30 P. M.; the employees would leave some time during the first shift (sometimes as early as 8:30 A. M. or as late as 1:30 P. M.) and would not return to work that day, but would report

back to work the following day for the regularly scheduled shift; employees on the second shift, with working hours from 3:30 P. M. to 12 Midnight at both plants, sometimes did and sometimes did not report to work on the days the employees on the first shift left; on days when they reported to work the employees on the second shift worked their full shift; on days when most second-shift employees did not report to work, they would report the following day for their regularly scheduled hours (R. 15-16, 35-37, 49). No disciplinary action was taken by the Company (R. 36, 40). The walkouts curtailed production and delayed shipments (R. 37).

On February 15th, 1946, after several stoppages, a secret ballot vote was taken at a special meeting of the Union, to authorize the adoption and continuance of this type of special meeting at any time. 1174 employees voted in favor of the continuance and 7 voted in opposition (R. 66, 81, Exhibits 12 and 13). The vote was taken for the purpose of complying with the strike-vote provision of Chapter 111.06 (2) (e), Wisconsin Statutes, in the event the Wisconsin Employment Relations Board should hold that to be necessary (R. 66, Exhibit 12).

The Company was advised during the course of negotiations, and while the stoppages were taking place, that further walkouts would take place if the demands of the union were not met (Finding of Fact 9 at R. 16; R. 40, 49). The Company had taken the position (subsequently rejected by the Wisconsin Board) that the stoppages were in violation of the expired contract, prohibiting strikes until after all grievance procedures had been exhausted. The Union claimed that all grievance procedures had been exhausted (R. 42).

The work stoppages affected production, but this effect was not as great as the effect of one lengthy strike. The

Company admitted that these stoppages by the Union were less costly to it than a full-time continuous strike would have been (R. 43).

Union officials claimed that the stoppages were for the purpose, among other things, of (1) interfering with the production of the Company so as to induce and compel the Company to agree to union demands (including the Directive of the War Labor Board) for inclusion in a collective bargaining agreement which was then in the process of negotiations (R. 47-48); (2) keeping the workers on the payroll, except for the deductions which the Company took for the brief periods of the stoppage, and so avoid the hardship of a protracted strike (R. 46); (3) preventing company-inspired rumors from wrecking the solidarity of the employees and protecting the union's security in the plant (R. 48-49); (4) conveniently getting all members of the union together during the work week rather than on Sundays (R. 88); and (5) putting the Company on the defensive in the collective bargaining process and so to bring economic pressure on the Company to agree to the Directive of the National War Labor Board (R. 47). The meetings were attended by a preponderant majority of those working (R. 49). The officials of the union never tried to name the activities, either by use of the term "strike" or otherwise (R. 45-46).

PROCEEDINGS BELOW.

The Company filed its complaint with the Wisconsin Employment Relations Board charging unfair labor practices by the Union in violation of Chapter 111, Wisconsin Statutes (1945) (R. 25-29). The Petitioners denied the allegation and set up certain constitutional defenses by way of answer (R. 30-32).

After hearing, the Board made findings of fact, conclusions of law, and entered an order, which insofar as is

pertinent here, provided that the union and its officers cease and desist from

> "(a) Engaging in concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours or engaging in any other concerted effort to interfere with production of the complainant, except by leaving the premises in an orderly manner for the purpose of going on strike" (R. 17).

Two separate proceedings were begun in the Circuit Court for Milwaukee County: a Petition for Review by the Union (R. 90-94), and a Petition for Enforcement by the Board (R. 12-14). The proceedings were consolidated by stipulation (R. 23).[1]

The Circuit Court, in its opinion entered October 18, 1946 ruled that Paragraph (a) of the Board's cease and desist order, quoted above, be vacated, and that the Board's Petition to enforce this portion of the order be denied (R. 1-12). A single judgment was entered accordingly in the Circuit Court on October 30, 1946 (R. 23-25). The Wisconsin Employment Relations Board and the Company appealed from that portion of the judgment vacating part of the Board's order (R. 96). The Union cross-petitioned for review of paragraph (b) of the order (R. 101). The Wisconsin Supreme Court reversed the judgment of the Circuit Court of Milwaukee County, and directed the Circuit Court to enter judgment enforcing the order of the Board (R. 104-105). Motion for rehearing was denied (R. 127).

---

[1] Under Wisconsin procedure, complaints are filed by the complaining party with the Wisconsin Employment Relations Board, and the Board must proceed to hearing on the complaint [Section 111.07 (2)]. After such hearing it may dismiss the complaint or make such order as it deems appropriate [Section 111.07 (4)]. The order is not self-executing. In order to enforce the order the Board, acting through the Attorney General, applies to the Circuit Court for judgment. Any person aggrieved has the right to apply to the Circuit Court for reversal or modification of such order [Section 111.07 (7) and (8)].

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred in the following respects:

In reversing the judgment of the Circuit Court for Milwaukee County, Wisconsin, which judgment vacated part of the order of the Wisconsin Employment Relations Board, and in directing entry of judgment enforcing the entire order, paragraph (a) of which, as construed by the Wisconsin Supreme Court, prohibited petitioners from engaging in peaceful work stoppages and attending union meetings during the course of a labor dispute arising out of collective bargaining negotiations; in so doing the Wisconsin Supreme Court committed further error in holding that Sections 111.06 (2) (c), and 111.06 (2) (h) as construed and applied in this case and any judgment or order based thereon were not in violation of Article I, Section 8, and Article VI of, and the Thirteenth and Fourteenth Amendments to, the Constitution of the United States.

SUMMARY OF ARGUMENT.

I.

A. State regulation of the activities of employees in matters involving interstate commerce must yield to the superior federal power if such state regulation results in forfeiture of federally-assured rights or impairs or limits such rights.

B. Section 7 of the National Labor Relations Act recognizes and affirms the historic and constitutional right of working men to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The activities in the instant case consisted of the leaving of the premises of the employer during working hours in a peaceful and orderly manner, and refusals to report for work. The immediate purpose was to attend union meetings, and to exert economic pressure upon the employer for the ultimate objective of attaining legitimate demands involved in collective bargaining negotiations then in progress. These are concerted activities which are protected under Section 7, and the restraint, therefore, does result in forfeiture of federally-guaranteed rights.

C. The judgment bans such activities not because they are illegal per se, but because of the alleged unlawful purpose to interfere with production. Interference with production, however, is implicit in the exercise of the protected activities and even though such interference with production may have been contemplated or intended, just so long as the ultimate objective is a legal objective, as was the situation here, the activities are not subject to restraint under any alleged police power of the state.

D. Section 111.06 (2) (c) of the statutes, also relied upon to sustain the judgment herein, affords no valid basis for the state's action because of failure to have a majority

of the employees vote by secret ballot to call a strike. The federal guaranties are not subject to such limitations by the state.

E. The restraint also interferes with, impedes or diminishes the right to strike which is guaranteed by Section 13 of the National Labor Relations Act. The activities herein were strike activities within the contemplation of the federal Act, the recent amendments to the federal Act which embody a definition of the term strike, court decisions, and the every day realities of industrial life.

The state cannot by artificial distortion of such term deprive petitioners of the right to strike.

F. Respondents seek to recast the judgment by asserting it only requires the petitioners to make their position and their objective known; that it is based upon an alleged unlawful objective, and that it is based upon an attempt on the part of petitioners to take over unilateral control of working hours. There is no basis in the record, the decision of the state board nor in the decision of the Wisconsin Supreme Court which would justify such rewriting of the judgment, nor would the record sustain such basis for limitation of the judgment's scope.

II.

By the passage of the Labor Management Relations Act of 1947 Congress has expressly pre-empted the field of unlawful conduct on the part of labor unions and employees and has established a comprehensive code for regulation and treatment of such conduct. By Section 10 (a) of the Labor Management Relations Act of 1947 Congress has expressly excluded the state from assuming concurrent jurisdiction over unfair labor practices committed by unions or employees unless the National Labor Relations Board expressly cedes such jurisdiction in cases of predominantly local interest, and where state regulation is not incon-

sistent with the federal regulation. Additionally, by reason of the passage of the Labor Management Relations Act there is present the situation which controlled the decision of this Court in the case of Bethlehem Steel Company v. New York State Labor Relations Board, 330 U. S. 767: each government is regulating the same relationship and has delegated to administrative authorities wide discretion in applying the regulation to specific cases.

III.

A. The judgment imposes involuntary servitude contrary to the Thirteenth Amendment to the Constitution of the United States. To previously restrain a concerted work stoppage if accompanied by an intent to return to work without settlement of the labor dispute imposes involuntary servitude, and limitations on a basic right.

B. The limitation on the right to induce work stoppages and to call union meetings is in violation of the Fourteenth Amendment to the Constitution of the United States, since the activities in their aggregate are the exercise of the basic civil liberty to strengthen employment rights and economic opportunities by combining with fellow workmen, and such activities embrace free speech and public assemblage.

IV.

Aside from its invalidity for the other reasons previously set forth, Section 111.06 (2) (e), in conditioning the right to engage in concerted activities on majority approval by secret ballot, imposes unreasonable classification in violation of the due process and equal protection clause of the Fourteenth Amendment. The classification has no basis in law since it applies to all businesses and all circumstances without qualification and without regard to "clear and present danger" or any other interest of the state which may be placed in jeopardy by minority refusals to work, or the absence of a secret ballot.

ARGUMENT.

I.

The Judgment and Statute as Construed and Applied by the Wisconsin Supreme Court in This Case Are in Derogation of Rights Secured to the Petitioners by Federal Law and Are, Therefore, Unconstitutional and Void Because in Violation of Article I, Section 8, and Article VI of the Constitution of the United States.

The question of whether the State's action in this case was in conflict with the National Labor Relations Act (49 Stat. 449, 29 U. S. Code, Par. 151, et seq.) was raised and argued at each stage of the proceedings (R. 30, 21, 90). This question was directly passed upon by the State Supreme Court (Court's opinion at R. 117, 119, 121).

The issue, therefore, is directly before this Court for determination.

A. The general principle involved: State regulation resulting in deprivation of rights under Federal regulation must yield to the superior Federal power.

The general principle of law, flowing from Article I, Section 8, and Article VI of the Constitution of the United States, that conflicting state law must yield to superior Federal law in matters involving interstate commerce, was particularized in labor relations matters in the case of **Allen-Bradley, Local 1111, et al. v. Wisconsin Employment Relations Board et al.**, 315 U. S. 740. In that case this Court had before it a challenge to the Wisconsin Employment Relations Act, Chapter 111, Wis. Stats., 1939. The challenge there was similar to the challenge herein made to certain sections of that law; but inasmuch as the

attack in the **Allen-Bradley** case, supra, was on the law as a whole and grew out of an injunction which classically fell within the police power of the state, that is, prohibition of mass picketing and other manifestations of force against the peace and dignity of the state, the challenge was rejected, because it was not shown "that freedom to engage in such conduct" was "so essential or intimately related to a realization of the guaranties of the Federal Act that its d niál is an impairment of the Federal policy". This court, however, was careful to point out (at p. 750) that although there was no merit to the claim of Federal supremacy on the facts therein presented, the answer would be clearly different if the Wisconsin Act had been or were so construed, that "• • • it impairs, dilutes, qualifies or in any way subtracts from any of the rights guaranteed and protected by the Federal Act," or that employees have been "• • • deprived of rights protected or granted by the Federal Act."

Subsequently, in **Hill v. Florida**, 325 U. S. 538, this principle was applied in declaring a state statute invalid under the Commerce clause of the Constitution because such statute required a collective bargaining representative to be licensed by the state as a prerequisite to the right to act as such representative, whereas the Federal Act imposed no such restriction.

It is upon the principles set forth in the above and related cases that petitioners rely.

That this principle of Federal supremacy may be properly invoked in this case on the basis of involvement of interstate commerce within the meaning of the National Labor Relations Act is established by the stipulation between the parties (R. 43), and the fact that the National Labor Relations Board had previously exercised its juris-

diction over the relationship between the company and the employees and certified the petitioning union as the collective bargaining agent for such employees (R. 33, 40).

B. The restrained activities in the instant case are protected activities under Section 7 of the National Labor Relations Act.

Section 7 of the National Labor Relations Act, supra, in the form in which it appeared during the period of time of the work stoppages with which this case is concerned (November, 1945 through May, 1946) provided that

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2]

The statutory language above set forth embodied congressional recognition of an historic right of constitutional rank.

This right was clearly recognized and delineated in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, some fourteen years before the enactment of the National Labor Relations Act:

> "They (labor organizations) were organized out of . . the necessities of the situation. A single employee

[2] Subsequent amendment has added the following language to Section 7, "and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." Public Law 101, 80th Congress, June 23, 1947, hereinafter referred to as the Labor Management Relations Act. This addition does not affect the quoted language as applicable to this case. Similar language in the Wisconsin Statutes was the basis for paragraph (b) of the order, which is not involved in these proceedings. The union activities in this case were carried on by virtually all employees in the collective bargaining unit (R. 16).

was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose, has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle. * * *."

Similarly, this Court in sustaining the constitutionality of the National Labor Relations Act in the case of **National Labor Relations Board v. Jones and Laughlin Steel Corporation,** 301 U. S. 1, referred to the **American Steel Foundries** Case, supra, and the case of **Texas and New Orleans Railway Company v. Railway and Steamship Clerks,** 281 U. S. 548, summarizing their import as follows (p. 34):

> "Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it."

This recognition of the right of employees to engage in concerted activities for their mutual aid and protection has now become so firmly a part of our jurisprudence, both by statute and by court decision that present day litigation concerns itself only with the question of what concerted activities are so protected, and to what ultimate objective they may be directed.

In the instant case, the activities of the petitioners (as set forth in the record herein, the Findings of Fact of the Wisconsin Employment Relations Board, and the decision of the Wisconsin Supreme Court), consisted of employees concertedly leaving their employment or concertedly refusing to report for work for the stated purpose of attending union meeting.[3] This was done without the consent of the company, and at the instigation of the officers and members of the Bargaining Committee. The purpose was to interfere with the production of the company, and by "such interference to induce and compel the complainant to accede to the demands of the union to be included in the collective bargaining agreement being negotiated between the parties" (R. 16). And the union and the individual petitioners had publicly stated "* * * their intent and purpose to engage in work stoppages similar to the stoppages engaged in * * * for the purpose of inducing and coercing the complainant into compliance with their demands" (R. 16). (See also Board's Memorandum at R. 19 and R. 21).

The contract between the parties had expired and there, therefore, was no contractual restriction on the right to strike (R. 15). Collective bargaining was in process to fix the terms of a new contract (R. 19).

Obviously, and on the face of it, we then have here the type of concerted activity which falls within the protection of the National Labor Relations Act, both as to its nature and its objective. This brings us to consideration of the statutory enactments which Wisconsin claims afford valid basis for restraint of the activities.

---

[3] There were some isolated instances of property damage and threats, by "persons unidentified." These were separately treated by the Board in paragraph (b) of the Order (R. 17). There is no claim made by Respondents that paragraph (a) depends in any way for its justification on paragraph (b), nor did the Wisconsin Board or the Wisconsin Court look upon those activities as being involved in paragraph (a). Although petitioners challenged paragraph (b) in the Court below, they do not ask this Court to review this portion of the Order, nor was it a basis for the Petition for Writ of Certiorari.

C. Section 111.06 (2) (h) as construed and applied in this case affords no valid basis for limitation of the protected right, and is, therefore, unconstitutional.

The Wisconsin Employment Relations Board based its Order squarely upon the provisions of Section 111.06 (2) (h) of the Wisconsin Statutes which reads as follows:

> "It shall be an unfair labor practice for an employee individually or in concert with others: • • •
>
> "(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

The Conclusion of Law and the Order of the Wisconsin Employment Relations Board follow the statutory language (R. 17-18), and the Wisconsin Board in its memorandum opinion expressly discusses and relies upon the above quoted provisions (R. 18-21).

The Wisconsin Supreme Court similarly sustained the validity of the Order under this section of the statutes.

Section 111.06 (2) (h) was manifestly designed to prevent taking "unauthorized possession of the property of the employer" except by "leaving the premises in an orderly manner." It was undoubtedly aimed at the "sit-down" strike which had dramatically manifested itself prior to the time of the passage of the Wisconsin law (May, 1939). See **N. L. R. B. v. Fansteel Metallurgical Corp.**, 306 U. S. 240. This was the view of the statute taken by the Circuit Court for Milwaukee County (R. 1-12), and by the three dissenting Wisconsin Supreme Court Justices (R. 123-125).

However, since this case clearly did not involve a "sit-down" or anything else approaching the taking of

"unauthorized possession," the majority of the Wisconsin Court shifted its emphasis to other language contained in Section 111.06 (2) (h).

In setting forth the statutes which it considered "applicable and material to the instant case" the Wisconsin Court quoted Section 111.06 (2) (h) as follows:

> "(h) • • • to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike" (Court's decision at R. 110).

The "unauthorized possession" part of the statute was therefore expressly eliminated from the case by the Wisconsin Court. The Wisconsin Board had similarly based its Order on the "interference with production" part of the statute. [See Board's Memorandum at p. 21 and its Conclusion of Law 1 (a) at R. 17.]

In treating the case under this limited reading of the section, the Wisconsin Board and the Wisconsin Court had before them the conceded result of "interfering with production" and the disputed element of whether these activities were strikes. Their decision was based upon their conclusion that the activities were not "strikes" under Wisconsin law. The holding of "unlawfulness" therefore followed.

Whether or not the involved activities are "strikes" under Wisconsin law may be for the Wisconsin Court to determine. Whether they are "strikes" under the national law of course raises a federal question to be determined by the appropriate federal agencies and courts. This point will be discussed later herein (pages 32-38, infra). For the purposes of this argument, the label to be attached to the activities becomes immaterial. What is material is whether these activities and the objects to which they were addressed are protected by federal law.

The nature of the activities is set forth in the Statement of the Case (pages 4 to 7 hereof) and summarized briefly above. That they were concerted activities for mutual aid and protection and to attain collective bargaining demands is undisputed.

There, therefore, remains for consideration whether these concerted activities otherwise protected by the National Labor Relations Act can, nevertheless, be validly restrained under the Wisconsin scheme of regulation.

1. *The activities in and of themselves were not declared to be unlawful. The unlawfulness was found in their purpose to interfere with production.*

It is to be noted at the outset that the activities **in and of themselves** were not declared unlawful by the Wisconsin Court or the Wisconsin Board. As pointed out above, the Court considered only that part of Section 111.06 (2) (h) which makes "interference with production" unlawful except in the case of a state-defined strike. Having found that the activities were not strikes, and that they were for the purpose of interfering with production, they were restrained. The frequency of the activities, the times at which they occurred, and their duration were considered only by the Court in connection with whether they could be labeled strikes within the excepting proviso to the statute. The Court held that although these activities were "concomitants of a strike". (Decision at R. 110) and although the "greater quitting of work involved in strikes includes the lesser quitting here involved" (Decision at R. 115) such activities nevertheless were not "strikes." However, nowhere in the Court's opinion is there any holding, direct or otherwise, that the activities in and of themselves were unlawful if they were not coupled with the "unlawful purpose" set forth in the statute to "interfere with production."

The Wisconsin Court refers throughout its opinion to "stoppage of work," "walking out," "refraining from work," "walk out," "leaving the premises," "engaging in concerted effort," "quitting," and "remaining away from work" as being the type of activities involved. And the Court emphasizes that their unlawfulness lies in their **purpose.** This is demonstrated by the following language of the opinion:

> "The quitting and remaining away from work in the instant case was done pursuant to a conspiracy to carry out an unlawful plan" (R. 114).
>
> "The order bans continuance of the acts involved for the unlawful purpose of interfering with production in the situation instantly involved" (R. 116).
>
> "That only 'concerted activities' to secure a lawful objective are protected is held in, etc. * * *" (R. 120).

Nor did the Wisconsin Board declare the activities per se unlawful. It too based its Order on the purpose of the activity, saying:

> "There can be no question but what continuous work stoppages engaged in during regularly scheduled working hours constitute an interference with production and thus falls directly within the terms of the section of the statutes above quoted" (R. 21).

As a matter of fact, the only provision of the Wisconsin Statutes which deals with the **nature** of union activities, as distinguished from the **purpose,** is Section 111.02 (2) (f) relating to mass-picketing threats, intimidation, obstruction of streets and highways, etc. This section was not a basis for the order. Therefore, despite the emphasis placed by respondents on the **nature** of the activities, all that is involved in this case is the question of whether the state may restrain peaceful, concerted activities directed to attainment of legitimate collective bargaining demands, even though there is a resulting interference with production.

2. *The purpose of the activities was to attain legitimate collective bargaining demands, a purpose which is fostered and protected by the National Labor Relations Act.*

In sustaining the Wisconsin Board's Order under Section 111.06 (2) (h) of the Statutes, the Wisconsin Supreme Court disposed of petitioners' argument (that the Order and Statute as so construed invaded their federal rights) by holding that "only 'converted activities' to secure a lawful objective is protected" (R. 120).

However, in the instant case the only unlawful objective found by the Court is "* * * the unlawful purpose of interfering with production in the situation instantly involved" (R. 116).

We then have here an attempted abridgement of the federally-recognized right of concerted activity on the ground that since such activity had the immediate result of interfering with production, it may be validly restrained.

But the interference with production here was admittedly for the ultimate purpose of inducing and compelling the employer "to accede to the demands of the unions to be included in the collective bargaining agreement being negotiated between the parties," (R. 16) the very purpose to which such concerted activities are normally and usually directed.

> "The truth to be dealt with is that every measure upon which a labor union relies for acceptance of its demands, involves the curtailment of some temporal interest of employer, non-union employe and frequently the public.
>
> * * * * * * *
>
> "When the objectives of concerted action are higher wages, shorter hours and improved working conditions,

all measures in themselves not tortious may be employed. Here the benefit to workers is direct and obvious, and the right to combine for such purposes is universally recognized." Frankfurter and Greene, The Labor Injunction (1930), pp. 24, 26.

In the case of **American Steel Foundries v. Tri-City Central Trades Council**, supra, it was recognized that working men withheld their labor "* * *" in order, by this inconvenience, to induce him (the employer) to make better terms with them."

And in **National Labor Relations Board v. Fansteel Metallurgical Corp.**, supra, in distinguishing between lawful and unlawful activities, this Court pointed out (at p. 256) that the violent and lawless conduct therein involved "* * *" was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful."

Surely there can be no doubt that the "inconvenience" and "pressure" referred to by this Court must necessarily include "interference with production." In fact the Wisconsin Board itself referred to these activities as "economic pressure on the employer in an attempt to compel the employer to accede to requests made by the Union" (Memorandum, R. 19).

Similarly, in **Apex Hosiery Company v. Leader**, 310 U. S. 469, in holding that although strikes or agreements not to work must of necessity cause some injury to employers they nevertheless were not in violation of the Sherman Act, it was pointed out, in Footnote 24 to the decision (p. 504), that other federal legislation aimed at protecting labor organizations support the conclusion that Congress did not regard the effects from such combinations as against public policy. The National Labor Relations Act

was cited as one such enactment, the Act being described as one which "recognizes the strike as a proper union weapon". See also **U. S. v. Hutcheson**, 312 U. S. 219.

In similar vein and import, although involving the right to peacefully picket rather than the right to strike, or to engage in concerted withholding of services, this Court held, in the case of **Thornhill v. Alabama**, 310 U. S. 88, that danger of injury to an industrial concern was neither so imminent nor so serious as to justify the anti-picketing statute therein involved; and further held, in the case of **A. F. of L. v. Swing**, 312 U. S. 321, that concern for the economic interests against which working men were seeking to enlist public opinion was not a basis for barring their right of communication.

In **Senn v. Tile Layers Union**, 301 U. S. 468 this Court distinguished between a malicious desire to injure and an action taken to protect labor's legitimate self-interest, even though injurious to the employer.

And although the Wisconsin Court relied upon the decision of Justice Holmes in **Aikens v. Wisconsin**, 195 U. S. 194, as somehow supporting its decision, the Court apparently overlooked Justice Holmes' holding in that case that the statute there involved was sustainable because applied to activities which were done "malevolently for the sake of the harm as an end in itself," rather than "merely as a means to some further end legitimately desired."[4]

See also **Restatement of the Law of Torts**, Volume IV, Pages 101-104.

[4] If the Wisconsin Court by its finding meant to hold that the activities herein involved were for the sole and malicious purpose of interfering with production without relationship to the collective bargaining that was then going on, and in complete disregard of the Wisconsin Board's findings, adopted by it, that the purpose was to compel compliance with collective bargaining demands, then it is a "spurious finding" or an "insubstantial finding(s) of fact screening reality," and is entitled to no consideration. **Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.**, 312 U. S. 287.

Also pertinent to the question of whether the Federal policy expressed by the National Labor Relations Act recognizes the right to engage in concerted activities which are purposed to interfere with production where collective bargaining is in progress is the provision of Section 2 (9) incorporating the definition of "labor dispute" which is found in the Norris-LaGuardia Act, 47 Stat. 71. The history of this provision of the Norris-LaGuardia Act was recently summarized in the case of **Allen-Bradley Co. v. Local Union No. 3, I. B. E. W.**, 325 U. S. 797, 805, in which case it was pointed out by the Court that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to • • • engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection'. This Congressional purpose found further expression in the Wagner Act, 49 Stat. 449."

That the activities herein involved grew out of a "controversy concerning terms, tenure or conditions of employment" is not subject to dispute and admitted in the record. During the course of such activities, therefore, the employees retain their status as employees under the definition contained in Section 2 (3) of the Act, and are entitled to the full protection of the Act regardless of "the wisdom or unwisdom of the men, their justification or lack of it." **N. L. R. B. v. Mackay Radio and Telegraph Company**, 304 U. S. 333.

Can it be said that the protection afforded to employees against discriminatory action by the employer may be put to naught by the State through the method herein devised? Can it be said that the state may do more than that which the law permits the employer to do—subject the employees to contempt proceedings for activities which cannot be made the basis for discharge?

The Wisconsin Court fails to recognize the historic fact that the national legislation incorporated, codified and gave congressional support to the prevailing common-law theory that the presence of "just cause" is tantamount to proof of "no malice". This principle was early enunciated by the English Courts in **Mogul Steamship Company v. McGregor**, L. R. 23, Q. B. Div. 598 (1889) and adopted in this country in a long string of cases, outstanding among which is the **American Steel Foundries Case**, supra. It will be recalled that this principle first received its greatest impetus in this country in the dissenting opinion of Justice Holmes, in the case of **Vegelahn v. Guntner**, 167 Mass. 92, 105-106, 44 N. E. 1077 (1896); following his earlier elaboration in "Privilege, Malice, and Intent", 8 Harvard Law Review 1 (1894).

When Congress reaffirmed the right of employees to engage in concerted activities and to strike, it surely had no intention of abandoning those principles which had become so firmly a part of our jurisprudence. The intent was clearly to the contrary.

Conclusive on the point should be the fact that recent legislation has defined the term "strike" as including "concerted interruption of operations by employees." Labor Management Relations Act, supra, Sect. 502. This demonstrates that "interference with production" was within and still remains within the contemplation of the Congress in establishing the national policy.

3. Conclusion and summary on the constitutionality of Section 111.06 (2) (h) and the judgment based thereon.

The simple facts of this case are that a labor union and its members (which under the law of Wisconsin are one and the same, **Hromek v. Frei Gemeinde**, 238 Wis. 204, 209, 298 N.W. 587), withheld their services in a peaceful and

orderly manner for short periods of time and at irregular intervals to achieve some measure of collective strength for the purpose of attaining their legitimate objective. This is a right firmly protected under Section 7 of the National Labor Relations Act. It is submitted the State cannot by any subterfuge or device or any claimed exercise of its police power validly restrain such activities.

Should the State be permitted to "impair or dilute such rights" which are so "essential or intimately related to a realization of the guarantee of the federal Act that (its) denial is an impairment of the federal policy." (**Allen-Bradley Local No. 1111 v. W. E. R. B.**, supra) by the expedient of saying that such rights may be denied where there is an interference with production then indeed the federal law and policy are meaningless.

The concerted activities in this case were legal under federal law. Nor were they, per se, illegal under state law. There was not present any of those elements which have, at times, resulted in some qualification on the enforcement of the right because of attendant circumstances.

There was no violence, no breach of the peace, no obstructing of ingress or egress, no usurpation of property or property rights, no violation of contract obligations. There was no boycott, secondary or otherwise, no combination with other groups, labor or non-labor, to effect the ultimate goal.

The means were as old as labor's struggle for existence.

The objective was admitted and unquestioned: To compel compliance with an order of an agency of the Government of the United States namely, the National War Labor Board, and to compel compliance with collective bargaining demands.

An intended result of the use of the legitimate means to attain such lawful ends, was interference with the employer's production—a normal, natural and contemplated result of the exercise of concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Yet the State of Wisconsin asserts that unless the means fall within Wisconsin's definition of a strike, and regardless of the fact that they are concerted activities not otherwise defined or found to be unlawful, they are subject to restraint if their purpose is to interfere with production even though "by such interference (petitioner's purpose was) to induce and compel the complainant to accede to the demands of the Union to be included in the collective bargaining agreement being negotiated between the parties" (R. 120).

To sustain such judgment, and the statute as so construed, is to put within the power of any state the means of completely destroying the historic rights of the working man as finally codified by the National Labor Relations Act. It would indeed be a mockery to say that while concerted activities for mutual aid and protection and for the purpose of collective bargaining are protected by national law, the right to engage in such activities shall be forfeited by state declaration that they become unlawful when they interfere with the production of a private employer.

It is, therefore, respectfully submitted that Section 111.06 (2) (h) and the judgment based thereon, as construed and applied by the Wisconsin Court in this case, are unconstitutional and void, and have no effect whatsoever because contrary to the paramount federal law (set forth in the National Labor Relations Act) in violation of Article I, Section 8 and Article VI of the Constitution of the United States.

D. Section 111.06 (2) (e) as construed and applied in this case affords no valid basis for limitation of the protected right, and is, therefore, unconstitutional.

Section 111.06 (2) (e) of the Wisconsin Statutes, as set forth by the Wisconsin Supreme Court as being applicable herein (Decision R. 110), provides as follows:

> "It shall be an unfair labor practice for an employee individually or in concert with others:
>
> "(e) To cooperate in engaging in (or) promoting * * * any * * * overt act concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."[5]

The Wisconsin Supreme Court in applying Section 111.06 (2) (e) held that the activities herein involved though not actual strikes under its definition of the term were, nevertheless, "overt concomitants of a strike," and as such required a prior license by a majority of the employees voting by secret ballot to call a strike.[6]

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[5] In the State's Brief opposing Certiorari, at page 28, the State now claims that the Order instantly involved was not based upon this section of the statute—that the Wisconsin Court merely construed such section, but, that no prohibition in the Order was based thereon. This is contrary to the previous position taken by the State, since it was urged in the court below that if the construction of Section 111.06 (2) (h) by the State Board should be rejected by the Wisconsin Supreme Court, particularly on the question of whether the activities involved were strikes or a strike under Wisconsin law, then the Order could, nevertheless, be supported on the alternative ground of violation of Section 111.06 (2) (e) although the Wisconsin Board had not based its Order on such section. The Wisconsin Court accepted both theories, and its decision is squarely bottomed on 111.06 (2) (e) as well as on 111.06 (2) (h). (Decision at R. 110.)

[6] The Wisconsin Court completely ignored the undisputed fact that the members of the Union at a specially called meeting did vote by secret ballot, 1174 to 7, to authorize the continuance of these activities, which vote was expressly taken to comply with the requirements of Chapter 111.06 (2) (e) in the event that the Wisconsin Employment Relations Board in the then pending and instant proceeding held that to be necessary (R. 66; Ex. 12 and Ex. 13, Tally of Ballots [not printed]). The only possible explanation for the Court's holding in face of the uncontradicted and undisputed record, undoubtedly lies in the fact that the word "strike" was not used in submitting the vote to the membership.

But the federally guaranteed rights embodied in Section 7 and Section 13 of the national Act cannot be whittled away by the state so as to make the exercise of such rights dependent upon majority vote or approval by secret ballot. No such limitation can be found in the federal Act. The guaranties of the Act extend to minority groups as well as to majority groups. **Yoerg Brewing Co. v. Brennan,** 59 F. Supp. 625; **American Chain and Cable Co., Inc., v. Truck Drivers & Helpers Union,** 68 F. Supp. 54; **Western Cartridge Co. v. N. L. R. B.,** 139 F. (2d) 855, 858 (C. C. A. 7th, 1943); **In re Republic Steel Corporation,** 62 N. L. R. B. 1008 (1945). Their rights are not subject to prior licensing. **Hill v. Alabama,** supra.

In **N. L. R. B. v. Reed & Prince Manufacturing Company,** 118 Fed. (2) 874 (C. C. A. 1st, 1941), cert. denied 313 U. S. 595 (1941), it was held that the National Labor Relations Board could, in its discretion, extend the protection of the Act together with remedial relief to strikers who sought to compel an employer to sign a contract unlawful under state law.

And in the case of **N. L. R. B. v. Hearst Publications, Inc.,** 322 U. S. 111, 123 (1944), this Court pointed out that to interpret the National Labor Relations Act on the basis of State law "would introduce variations into the statute's operations as wide as the differences the forty-eight states and other local jurisdictions make. * * * Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees' organization and of collective bargaining."

Application of this same principle is demonstrated by the holding that the right to strike assured by the national Act cannot be taken away by state legislation which conditions such right by the requirement of a "cooling off" period. **Hamilton v. N. L. R. B.,** 160 F. (2) 465 (C. C. A.

6th, 1947), cert. denied sub nom. **Kalamazoo Stationery Co. v. N. L. R. B.**, 332 U. S. 152 (Oct. 1947).

It is submitted that mere failure of technical compliance with the state's requirement of a secret ballot majority vote by a union certified by the National Labor Relations Board, representing virtually all employees affected and acting pursuant to the mandates of an overwhelming majority of the employees, provides no basis for deprivation or restraint of the federally guaranteed rights.[7]

E. The activities are also protected under Section 13 of the Federal Act. They were strikes both in fact and in law.

Section 13 of the National Labor Relations Act at the time of the activity here in question provided as follows:

> "Nothing in this act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

This language is more than a rule of construction. It is the flat recognition of the right to strike as pointed out in the case of **N. L. R. B. v. Fansteel Metallurgical Corporation**, supra, wherein it was stated (p. 256),

> "Congress also recognized the right to strike—that the employees could lawfully cease work at their own volition because of the failure of the employer to meet their demands. Section 13 provides that nothing in the Act * * * 'shall be construed so as to inter-

[7] Section 111.06 (2) (e) is further subject to attack, as applied in this case, on the additional grounds which were previously presented to this Court in the case of **Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board**, 315 U. S. 437 (1942), but which were not there considered because of this Court's conclusion that the Wisconsin Court's decision in that case was not, in fact, based upon Section 111.06 (2) (e), but on the acts of violence. These other grounds of attack are set forth later herein at pages 115 to 125.

fere with or impede or diminish in any way the right to strike'. But this recognition of 'the right to strike' plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work. * * *"

Wisconsin here has denied that right by interpreting the word "strike" so narrowly so as to exclude the activities herein involved from such definition.[8]

And while this Court is bound by the interpretation or construction of the Wisconsin Statutes placed upon it by the highest judicial authority of that State, it is not so bound in ascertaining the meaning of the word "strike" under federal law, nor in protecting fundamental rights.

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution." **Mugler v. Kansas**, 123 U. S. 623, 661 (1887).

The National Labor Relations Act at the time of the activities herein involved did not contain a definition of the word "strike." However, the National Labor Relations Board which had the duty under the Act of construing and applying the Statute in the first instance has held

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8 It was necessary for the Wisconsin Court to rule on the question of whether the activities were a strike since under the state law the question of whether petitioners had committed an unfair labor practice under Section 111.06 (2) (h) was dependent on whether their activities were or were not strikes within the excepting proviso of that section.

in the following cases that activities, similar in form and content to the activities herein involved, were protected strike activities under the national Act, as well as concerted activities within the contemplation of Section 7:

Massey Gin and Machine Works, Inc., 78 N. L. R. B. No. ..... (July, 1948) (walkout without previous announcement of intention to strike and unaccompanied by picketing held "no less a strike because the group may not have labeled it a strike, or engaged in the additional activities which usually accompany a strike"); **Spencer Auto Electric, Inc.**, 73 N. L. R. B. 1416 (walkout held strike even though not preceded by demand); **Niles Firebrick Co.**, 30 N. L. R. B. 426, enforced 124 F. (2) 366, ~~cert. denied 316 U. S. 681~~ (refusal to take a job "while not a total strike" held a "partial strike"); **Harnischfeger Corporation**, 9 N. L. R. B. 676 (refusals to work overtime held "partial strike"); **American Manufacturing Concern**, 7 N. L. R. B. 753 (walkouts followed by returns to work held strikes even if not considered as such by employees).

In addition to these Board and Court decisions under the national Act, we now have the benefit of Congressional definition of the term "strike":

> "Sec. 501 (2). The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employees" (Labor Management Relations Act, supra).

It will be noted that this Congressional definition of the term, as distinguished from the Wisconsin Court's definition, or any other limiting definition, has made it clear that **any** concerted stoppage of work or interruption of operations by employees comes within the meaning of the

term "strike." This definition refers to any stoppage, whether long or short, and does not embrace any time limitation nor test of "success" or "abandonment."

Under the amended National Labor Relations Act of 1947 the right to strike, under the circumstances here involved, is still undiminished even though the Act now defines unfair labor practices of labor unions and provides for means of prevention of such unfair labor practices by the National Labor Relations Board.[9]

The positive declaration by the Congress of the United States of what is included in the term "strike," when taken together with the fact that in defining unfair labor practices on the part of labor unions the right to do that which was done here was not in any way curbed or modified, demonstrates clearly that Congress reaffirmed in the present law the rights ascribed to the petitioners under the old law.

In view of these circumstances, Wisconsin's distortion of what is meant by the word "strike" within the meaning of Section 111.06 (2) (h) becomes material on this appeal. Under guise of this interpretation Wisconsin has sought to limit federally-guaranteed rights. Since this Court has the ultimate authority to scrutinize the record so as to prevent the derogation of constitutional rights by methods such as this (**Milk Wagon Drivers' Union, Local**

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9 The original Section 13 has been amended to read as follows:

"Section 13. Nothing in this Act, **except as specifically provided for herein,** shall be construed so as **either** to interfere with or impede or diminish in any way the right to strike, **or to affect the limitations or qualifications** on that right." (Amendment emphasized.)

This modifying language was added because of the provisions of Section 8 (b) of the new law which imposes limitations or qualifications on the right to strike, none of which limitations or qualifications apply to the type of activities herein involved.

See statements of Senator Taft, one of the sponsors of the Act, at 93 Cong. Rec. 3950, 3951 (1947), emphasizing that the Act "recognizes freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract."

723, v. **Meadowmoor Dairies, Inc.**, 312 U. S. 287, 293), the Wisconsin Court's unrealistic definition requires discussion, lest we fall victims to the "tyranny of labels" (Cardozo, J., in **Palko v. Connecticut**, 302 U. S. 319, 323).

It is clear that the failure of petitioners to name these activities a "strike" has no relevance to the issue of whether they are strikes or not. (See cases cited supra, at page 33.) And it is apparent from the record that although petitioners had not tried to name the activities, they recognized there was nothing new about the work-time stoppages, and that the purpose of the activities was to stave off a full-time strike because of the hardship of having working men out on the street for long periods of time (R. 45-47). The employer conceded that this type of stoppage was less injurious to it than a full-time strike would be (R. 43).

Any definition of the term "strike" embraces four elements: (1) A leaving of employment; (2) by mutual understanding; (3) by a body of workmen; (4) to enforce compliance with demands made on an employer. **N. L. R. B. v. Carlisle Lumber Co.**, 94 F. (2d) 138, 145 (C. C. A. 9th, 1937); **Iron Moulders Union v. Allis-Chalmers**, 166 F. 46 (C. C. A. 6th, 1908); **Michaelson v. U. S.**, 291 F. 940 (C. C. A. 7th, 1923); **Webster's International Dictionary**, Second Edition, Unabridged, 1944.

It is undisputed that the stoppages were by a body of workmen for the purpose of enforcing the collective bargaining demands made upon the employer by the union. There can be no question that demands were made prior to the time of the stoppages since negotiations were in progress with respect to these demands, and since the Wisconsin Employment Relations Board did so find in its Finding of Fact No. 8, quoted earlier (R. 16).

It is difficult to extract from the state court's opinion the reasoning upon which it based its conclusion that these were not strikes, but apparently it is bottomed on the Court's holding that the withdrawing from employment which characterizes a strike "implies something more than the temporary quitting with intent to resume commencement of work on the next shift." It is then stated that such withdrawal "implies a continuous withdrawal until the object of the strike is attained or the strike abandoned," and it is further stated that there must be a "continuance of unemployment" (Decision at R. 112-113).

By these attempted qualifications the Wisconsin Court has in effect said this:

If working men concertedly leave their employment to attain collective bargaining demands, and agreement is reached with their employer prior to their return to work they were striking; if they did not reach agreement, completely abandoned their demands, and returned to work they were striking; but if they did not reach agreement, and, nevertheless, returned to work resolved to concertedly withdraw another day and to repeat the process, if necessary, until agreement is reached then neither the first nor any subsequent stoppage nor all together, even if ultimately successful, were strikes!

The last referred to situation is the situation here, of course, excepting that by virtue of the restrain imposed by Wisconsin, the employees have been prohibited from continuing their activities until success or compromise. The employees here hoped that one temporary withdrawal would be sufficient to gain an agreement. They were prepared, however, to engage in a series of withdrawals, if necessary, to attain this end. The company was so advised (R. 40, 49).

There was, therefore, present here the two necessary intents which distinguish a strike from either an absolute quit or a temporary quit unrelated to a labor dispute; (a) an intention to resume employment, and (b) a purpose to ultimately gain a satisfactory collective bargaining agreement.

There was here the same type of unemployment each time the employees concertedly withdrew or concertedly refused to report to work as there is in any strike, but the length of the unemployment was shorter, the consequent embarrassment to the employer was less, and the periods occurred with greater frequency.

Realistically speaking, the Wisconsin Court's qualification of **continuous unemployment** until the demands are either met or abandoned was present in this case since here was a refusal of **continuous, uninterrupted employment,** until the demands were attained or compromised.

And testing each stoppage individually, the activities here involved were strikes even under the Wisconsin definition. It is absurd to assume, in the face of the record here, that it was not contemplated, as to each stoppage, that such stoppage would be terminated at any time that agreement would be reached **prior** to its intended terminal point, or that it would be the **last** stoppage if the employer yielded and signed an agreement. The employees were prepared to stay out of employment for only a stated period of time, even if their demands were not met, but they were also prepared to terminate the stoppage or the entire series of stoppages and to resume uninterrupted employment upon the meeting of their demands if such contingency took place before the stated period of time or at the conclusion of any one such strike in the series. So there was present here the basic intent, not only as to the whole series of stoppages, but as to each individual

stoppage, to return to work earlier, upon granting of the demands or the signing of an agreement.

Bearing in mind that there was here present a continuing labor dispute over the terms and conditions of a collective bargaining agreement, the activities herein, considered severally or as a whole, were a strike or strikes, both under definition of the federal Act and cases and the every-day realities of industrial life.

We have treated the rights of employees under Sections 7 and 13 separately because of the Wisconsin Court's peculiar approach to what is or is not a strike. Both sections should really be considered together since Section 13 is a reaffirmation of one of the specific rights secured by Section 7, and additionally, is a caution against any interpretation of the Act which may result in any limitation on the right to strike. But, labels aside, all that is involved here is a concerted activity for mutual aid and protection, and in furtherance of legitimate collective bargaining demands. It is, therefore, respectfully submitted that these concerted activities, considered individually or in series, and having been engaged in for the purposes of attaining collective bargaining demands, are within the protection of the National Labor Relations Act, and accordingly, not subject to restraint by the State.

F. Brief answer to contentions of respondents.

The respondents, in opposing the granting of a Writ of Certiorari herein, sought to minimize the scope and significance of the Board's order and the direction for judgment enforcing the same. Anticipating that respondents' briefs will follow, in the main, this attempted justification of the judgment, we shall answer it briefly herein, and so avoid, if possible, the necessity of burdening the Court with a reply brief.

1. *Answer to respondents' argument that the order only requires that petitioners make their position and their objective known.*

It is urged by the respondents that the order is based principally upon the fact that the union did not make its position clear at the outset, and that strikes or concerted activities to be permissible must be preceded by an announcement of their purposes. As we have already pointed out, the fact is, as found by both the Wisconsin Board and the Wisconsin Court, the union did make known its objectives by public statements that the activities would be continued until there was compliance with its demands (R. 16). A representative of the Company testified that he was advised that these concerted activities would continue if the demands of the union were not met (R. 40, 49). To say that the Company was unaware of what those demands were is to belie the conceded fact that collective bargaining was in progress and there were many issues in dispute, including the failure of the Company to comply with the Directive of the National War Labor Board and the additional wage demands made after V-J day (R. 19, 34, 35, 43).

Petitioners would gladly accept a construction of the order which limits its scope to failure to present demands since it is clear that there was here no attempt of any kind by petitioners to shield or obscure the terms of the agreement which they were seeking to attain. But the decision of the Wisconsin Supreme Court as already pointed out was not based upon this failure to announce objectives nor could it have been in face of the record. The Wisconsin Court's decision is based upon the alleged unlawful purpose of "interference with production."

And even if petitioners were to concede that which the record clearly contradicts—that the order bans the con-

certed activities engaged in only because of failure of petitioners to state their objectives, and that no objective was in fact stated, the petitioners assert for all the reasons already set forth in this brief that the rights guaranteed by federal statute and Constitution are not subject to any such arbitrary limitation.[10]

2. *Answer to respondents' suggestion that the activities were for the unlawful objective of attaining a maintenance of membership clause contrary to State law.*

It is also suggested by the respondents that if, in fact, the objectives were stated, such objectives necessarily include an illegal objective because based upon the Directive of the National War Labor Board which included a maintenance of membership clause which was illegal under the laws of the State of Wisconsin unless approved by two-thirds vote. [Section 111.06 (2) (b), construed together with Section 111.06 (1) (c).]

The respondents argued the same point to the Wisconsin Supreme Court. That it was rejected by the Wisconsin Supreme Court is apparent from its decision since nowhere in that decision is there any direct or indirect indication that the Wisconsin Court sustained the order of the Board and directed judgment enforcing such order because of any alleged illegal demand. This was properly so, since it is undisputed in the record that the union did not insist on a maintenance of membership clause but was willing to trade it off (R. 43, 47, 48-49); that prior to the hearing before the Board the requisite referendum had been conducted by the Board and the requisite number of votes obtained by the union (R. 40-41); that the demand was predicated on a Directive of the War Labor Board

[10] See cases cited at page 33, supra, holding that it is not necessary to make a demand or to make demands known in order to avail one's self of the right to engage in the concerted activities protected by the Act.

which type of Directive had been previously sustained by the Wisconsin Court, in recognition of the superior federal power, in the case of **International Brotherhood of Paper Makers v. Wisconsin Employment Relations Board,** 245 Wis. 541, 15 N. W. (2) 806; and that nowhere in the findings of fact, conclusions of law, order or memorandum opinion did the Wisconsin Employment Relations Board, whose findings and conclusions were adopted by the Wisconsin Supreme Court, refer to or rely upon this aspect of the case nor did the Company seek review of the Board's failure so to do. The state Board must have been aware of the fact that it had already conducted the necessary referendum, with a result favorable to the Union.

Finally, the state contradicts its own position when in its Brief in Opposition to the Petition for Writ of Certiorari, at page 28, it flatly states:

> "The remedy applied is based solely on Section 111.06 (2) (h)."

How then could it have been based upon a purported attempt to compel the employer to unlawfully sign a union shop agreement prohibited by Sections 111.06 (1) (c) and 111.06 (2) (b) of the Wisconsin Statutes?

Neither the decision of the Court nor the record will support the position that the order herein is based upon petitioners' attempt to compel the employer to yield to an allegedly illegal demand.

3. *Answer to respondents' position that the activities were an attempt to take over unilateral control of working hours without release of control over the means of production.*

It is urged by the respondents that the nature of the activities is such that it represents an attempt on the part

of the union or the employees to unilaterally control their working hours without at the same time releasing their control over the means of production.

This contention represents another attempt on the part of the respondents to recast the order of the Board and to reframe the decision of the Wisconsin Supreme Court. We have previously pointed out that the Wisconsin Court has construed the statute to make the instant activities unlawful **not** because of their nature, frequency or irregularity, but because of the purpose to which they were directed—"interference with production." And since the state Court excised the language "to take unauthorized possession of the property of the employer" from the statute in considering the applicability and materiality, its decision could not conceivably be based upon refusal to release control of production.

Nor does the State claim that these activities actually did result in the taking of unilateral control or did actually fail to release control of the means of production. Inasmuch as control of working hours and control of means of production has been and is within the Company's authority, it is rather far-fetched to say that the order was based upon that feature.[11] In making this argument the respondents find themselves in an untenable position when it is claimed that the activities engaged in are not protected activities under the National Labor Relations Act. If it is true that these are not protected activities under the federal law, then the employer can continue to assert his control over the property and over the hours of work since he will then have the unlimited right to discharge any or all who participate in the unprotected

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11 The State refers to one instance of a "sit-down." This was entirely unrelated to the current dispute and was without union authority, having been of spontaneous origin (R. 79-80, 82). The incident is nowhere referred to by the State Board or Court. The State Court expressly eliminated the incident from its consideration by disregarding the "unauthorized possession" portion of the statute in upholding the order.

activities. **National Labor Relations Board v. Fansteel Metallurgical Corp.**, supra; **N. L. R. B. v. Columbian Enameling & Stamping Co.**, 306 U. S. 292 (1939); **N. L. R. B. v. Sands Mfg. Co.**, 306 U. S. 332 (1939); **Southern Steamship Co. v. N. L. R. B.**, 316 U. S. 31 (1942). (It is to be noted that these cases involved forfeiture of reinstatement rights under the Act, and not injunctions.)

On the other hand if these are protected activities it would make no difference what the result is insofar as the employer is concerned since his resulting damage would be in the nature of damnum absque injuria, and he would have to accommodate himself to such activities within the framework of the law (See pp. ~~37-45~~ 22-28, supra).

It would be an anomaly to hold that while an employer could not discharge employees for engaging in protected activities, the State might accomplish the same result for the employer by restraining the exercise of the protected rights.[12]

If the exercise of the federally-guaranteed rights results in embarrassment or operational difficulty to the employer it always remains within his province when confronted with economic strikes to replace economic strikers. **N. L. R. B. v. Mackay Radio and Telegraph Co.**, supra. If the hiring of replacements under the circumstances becomes difficult that does not make the activities unlawful. The

[12] In the following cases it was held to be a violation of the National Labor Relations Act to discharge employees for having engaged in activities similar to those instantly involved: **American Manufacturing Concern**, 7 N. L. R. B. 753 (walkouts during posted working hours in protest over length of work week); **Harnischfeger Corporation**, 9 N. L. R. B. 676 (refusal to work overtime and early arrival of night shift); **The Good Coal Co.**, 12 N. L. R. B. 136, enforced 110 F. (2) 501, cert. denied 310 U. S. 630 (refusal to work on scheduled work day); **Cudahy Packing Co.**, 29 N. L. R. B. 830 (part-time interruptions of work); **Niles Fire Brick Co.**, 30 N. L. R. B. 426, enforced 128 F. (2) 258 (refusal to take job where would result in discharge of union leader); **Spencer Auto Electric, Inc.**, 73 N. L. R. B. 1416 (walkout because of alleged discriminatory discharge); **Barton Brass Works**, 78 N. L. R. B. No. 56 (attendance at union meeting); **Massey Gin and Machine Works, Inc.**, 78 N. L. R. B. No. ... (walkout without notice and not called a strike).

state court reasoned backwards, and said that hardship on the employer makes otherwise lawful activities unlawful. The question is whether the activities are lawful because of either the means used or the end sought, and not because of resulting injury which is damnum absque injuria. **Senn v. Tile Layers Union,** 301 U. S. 468.

It might also be possible for the employer to take the position that since the activities make it unable to schedule its production properly, it may close the plant down thereby compelling a full-time strike until such time as negotiations are completed,—thus creating a situation the absence of which, respondents claim, justifies the restraint. **In re Duluth Bottling Association** (1943), 48 N. L. R. B. 1335.

In urging that these activities are not within the protection of the National Labor Relations Act because by such activities petitioners were seeking to unilaterally control their working hours, the state relies upon the case of **C. G. Conn, Ltd., v. N. L. R. B.,** 108 F. (2d) 390 (C. C. A. 7th, 1939).

This case was also cited to the Wisconsin Supreme Court, but was not mentioned nor relied upon by the court in its opinion. This omission confirms petitioners' position that the sole basis of the Wisconsin Court's judgment is the asserted "unlawful purpose" of "interference with production" rather than the means used.

The **Conn** Case, supra, involved a refusal to work scheduled hours because of dissatisfaction with those hours. The federal court said that under those circumstances the employees were seeking to determine for themselves what their hours of employment shall be and that the employer could discharge for such refusals.

But in the instant case petitioners were not seeking to establish their own hours of employment. They were not

insisting that they be employed only seven, six or five hours a day. They were not insisting that they be employed on Mondays, Wednesdays, and Fridays, and not on Tuesdays and Thursdays. They were not insisting that they have a day off every five or ten days. (Petitioners' refusal to work Saturday overtime on a few occasions was not referred to at all by the Board in its findings and conclusions, nor by the state court, and did not form a basis for its order.) Petitioners were not insisting on the right to work on terms prescribed solely by them, but were insisting on **the right not to work** in order to arrive at an agreement relating to the terms of their employment. (In some cases the second shift did not report at all.)

The dispute arose over general terms and conditions of employment, and the refusal of the employer to accept a Directive Order of the National War Labor Board. In order to compel agreement, the employees engaged in strikes, not every day, nor every two days, but at such times and at such intervals as the Executive Board in its discretion saw fit, in accordance with the instructions of the employees. The strikes were called in the middle of a regularly scheduled work shift, not because the employees were dissatisfied with the duration of such shift, nor because they did not care to work all of the shift, but because they wanted to put pressure upon the Company with respect to the matters in dispute. This they had a right to do, and the decision of the federal Court in the **Conn** Case does not hold to the contrary in any way or manner. (See dissenting opinion of Treanor, J., at p. 401, holding that refusals to work overtime were protected activities under the Act, but the employer could replace such employees as economic strikers.)

It is submitted that respondents' attempt to recast the decision and judgment is neither supported by the record nor the decision of either the Wisconsin Board or the Wis-

consin Court, and further submitted that even if this Court were to accept respondents' interpretations, they afford no basis for sustaining the validity of the order and judgment in view of the superior federal power.

II.

The Wisconsin Board and Courts Had No Jurisdiction Over the Subject Matter. The Order and Judgment Are, Therefore, Void Under Article I, Section 8, and Article VI of the Constitution of the United States.

The Wisconsin Supreme Court rejected petitioners' argument that Sections 111.06 (2) (e) and 111.06 (2) (h) as applied and construed in this case deprive petitioners of federally-guaranteed rights. The court, however, considered not only the question of the state's power to act in a certain way, but also considered the question of the state's jurisdiction to act in the first instance. This last question relating to the right of the Wisconsin Board to take jurisdiction and act had not been originally raised by petitioners. This for the reason that it appeared to petitioners from this Court's decision in the case of **Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board**, supra, that, absent any legislation by the federal Congress relating to unfair labor practices of unions or employees, the State was not precluded from reasonable regulation of those activities except insofar as the regulation had to be consistent with the federal policy.

Although this question of jurisdiction to act was not originally raised, the Wisconsin Court because of the decision of this Court in the case of **Bethlehem Steel Company v. New York State Federation of Labor**, 330 U. S. 767, passed upon the question, and concluded that the **Bethlehem** case, supra, was not applicable, and that Wisconsin maintained its jurisdiction over the subject mat-

ter (Decision at R. 117-119). After the decision of the state Court on June 10, 1947, the Congress of the United States, on June 23, 1947, adopted the Labor Management Relations Act of 1947 over the President's veto. Because of the Wisconsin Court's interpretation of the **Bethlehem** case, supra, and the passage of the Labor Management Relations Act, petitioners in their Brief on Motion for Rehearing, at pages 31 through 34, pressed the question relating to the jurisdiction of the state to act at all, and requested the Court to reconsider its opinion on this point. The Wisconsin Court refused to grant the Motion for Rehearing.

Because of these circumstances, the question is properly before this Court, it having been urged and rejected in the Court below, and the rule being that appellate courts must consider the law at the time of review rather than at the time of entry of judgment. **Carpenter v. Wabash Railway**, 309 U. S. 23, 27; **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 201; **N. L. R. B. v. Budd Manufacturing Company**, 92 Law. Ed. (adv. op.) 210.

The starting point in considering this question would seem to be the **Allen-Bradley** case, supra. In that case it was held that the National Labor Relations Act had not pre-empted the field because "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board." Following the **Allen-Bradley** case, inconsistent state action was struck down on the basis of impairment of federal rights, rather than on the basis of congressional pre-emption of the field. **Hill v. Florida**, 325 U. S. 538.

Thereafter the question of pre-emption by the federal Government was squarely presented to this Court in the **Bethlehem** case, supra, which involved the right of the

New York State Labor Relations Board to conduct an election and to make a certification of bargaining representatives among employees of an employer over which the National Labor Relations Board clearly had jurisdiction although it had taken no positive action in the particular case.

In the **Bethlehem** case, supra, the question of preemption was extensively discussed because there was no certain declaration in the National Labor Relations Act that the Congress intended to preempt the field of collective bargaining elections among employees of employers engaged in interstate commerce. The problem, therefore, was whether or not the intention to exclude state power could be implied from the scheme and policy of the federal regulation. Pertinent here is the Court's declaration that (p. 773)

> "when Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own."

It is with this rule in mind that we turn to consideration of the Labor Management Relations Act of 1947.

In enacting this law the Congress of the United States declared its policy:

> "• • • to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with legitimate rights of the other, to protect the rights of individual employees in their relations with labor

organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" [Sec. 1 (b)].

Congress also amended the findings and policies of the original National Labor Relations Act by adding the following language:

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed (Sec. 1, N. L. R. A.)."

But Congress also reaffirmed the policy of the United States to protect

"* * * the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To carry out this new scheme of federal regulation, Section 8 (b) of the Labor Management Relations Act sets forth and defines with particularity and in wide scope what are certain "unfair labor practices" on the part of labor organizations or their agents, imposing certain limitations on their activities, and in providing for means of restraining the prohibited activities.

Section 10 (a) of the Act then provides as follows:

> "Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: **Provided,** That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Under the National Labor Relations Act, then, as amended by the Labor Management Relations Act of 1947, Congress has now engaged in a comprehensive system of regulation of the activities of employees acting through their unions, such regulation invoking both the processes of the National Labor Relations Board and the processes of the federal courts for effective enforcement. By the preamble, declaration of policy, and Section 10 (a) Congress has now made clear its intention to pre-empt the field of unfair labor practices on the part of employees and labor unions with the possible exception of the ordinary police power of the State to act in cases involving manifestations of force which would be unlawful whether engaged in by labor unions, employees or others, such as violence, breaches of the peace, rowdyism, etc. Therefore, the situation which was contemplated by the **Allen-Bradley**

case, supra, has now come into being, and the circumstances set forth in the **Bethlehem** case, supra, as evidencing the desires of Congress to exclude state action are clear and certain. **Gerry v. Superior Court**, 194 P. (2) 689 (Calif., 1948).

And even if there were not the express exclusion contained in Section 10 (a) of the amended Act, exclusion of state action in this case is nevertheless demonstrated under the tests set forth in the **Bethlehem** case, since here (p. 775)

> "* * * both governments have laid hold of the same relationship for regulation, and it involves the same employers and the same employees. Each has delegated to an administrative authority a wide discretion in applying this kind of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld two administrative bodies are asserting a discretionary control over the same subject matter * * *. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. * * * But the power to decide a matter can hardly be made dependent upon the way it is decided. * * * We do not think that a case by case test of federal supremacy is permissible here."

Wisconsin and the federal government are now each seeking to regulate the unfair labor practices of employees, labor unions, and their agents in matters affecting and involving interstate commerce. Each has created an administrative agency with a wide discretion in applying the plan of regulation.

For example, under the federal Act, whether a complaint is to be issued or not is a matter for exclusive determina-

tion by the General Counsel of the National Labor Relations Board, Sec. 3 (d). Other wide administrative authority, discretionary in nature, has been delegated by the Board to the General Counsel. N. L. R. B. Rules and Regulations, Series 5, Section 204.3, Code of Federal Regulations, Title 29, Ch. II, Part 204 (13 F. R. 654).

Under the Wisconsin Act the invoking of the jurisdiction of the Wisconsin Board by the filing of a complaint requires the Board to handle the matter [Section 111.07 (2)].

Under the federal Act certain limits are placed upon the type of relief which may be granted [Section 10 (c)]. Wider discretion, however, is vested in the Wisconsin Employment Relations Board [Section 111.07 (4)].

There are many other wide differences in the provisions of each law, as will be disclosed by setting the following provisions of each Act side by side. (An appendix setting forth the Wisconsin Act is submitted herewith for the convenience of the Court.)

Labor Management Relations Act		Wisconsin Employment Relations Act
Section 2 (3)	defining employee	Section 111.02 (3)
Section (2) (9)	defining labor dispute	Section 111.02 (8)
Section 8 (a) (2)	employer domination or interference with labor organizations	Section 111.06 (1) (b)
Section 8 (a) (3)	permissible union security provisions	Section 111.06 (1) (c) and Section 111.02 (9)
Section 8 (a) (5) and Section 8 (d)	relating to good faith collective bargaining	Section 111.06 (1) (d) and (e)
Section 8 (b) (1)	protection of employees' rights from union interference	Section 111.06 (2) (a)
Section 8 (b) (2)	union causing an employer to discriminate against employees	Section 111.06 (2) (b)
Section 8 (b) (4)	limitations on certain types of boycotts and strikes	Section 111.06 (2) (c), (f), (g), (h), (i), (j), (l) and Section 111.02 (12) (14)

Another wide difference will be found in the fact that there are no filing requirements in the state law similar to those required by 9 (f), (g) and (h) of the federal law.

These comparisons are not intended to be all-inclusive or as detailed or comprehensive as they might be, but by way of example sufficiently demonstrate that each statute regulates union or employees' unfair labor practices, as well as employers' unfair labor practices, along its own pattern without much regard for the other, and in a manner that the two cannot consistently stand together.

The variance between the two Acts in both substance and procedure is surely the best evidence of the difference in standards by which each is governed and the impossibility of the Wisconsin Act validly standing side by side with the national Act.[13]

To permit concurrent jurisdiction under such circumstances would destroy entirely the uniform plan of regulation emphasized by the Congress in giving to the National Labor Relations Board a limited authority to cede jurisdiction to state agencies in unfair labor practice cases in certain types of situation and then only where the state statute is consistent with the federal Act either in its language or construction [Sec. 10 (a)].

An apparent inconsistency is demonstrable by the instant case in which there is involved the question of the definition of the term "strike" as well as the legality of concerted activities and the legitimacy of certain objectives.

That untold mischief can result from the instant decision of the Wisconsin Court if it is permitted to stand, is

[13] That there are differences in the powers and procedural requirements of the State and National Boards, as well as in the philosophy of the two acts, is pointed out by one of counsel for respondent State Board in 1946 Wisconsin Law Review, at 193, 195.

illustrated by the following example: Let us assume that the same activities engaged in by petitioners in this case should be carried on by other employees against their employer in a similar situation; that such employer, on the basis of the Wisconsin Court's holding that such activities are not protected activities under the National Labor Relations Act, discharges or refuses to reinstate the employees involved in such activities; that such employees then file their complaint with the National Labor Relations Board; that the National Board then determines, as we believe it must, that the activities are protected by the Act, and are not unfair labor practices under the Act. Under such circumstances the employer undoubtedly would be required by the National Board to reinstate such employees and make them whole for any wage loss which they may have suffered in the interim. Reliance, therefore, by an employer upon Wisconsin rulings results in imposing upon such employer sanctions under federal rulings. Similarly, labor unions and employees confronted with the determination of the Wisconsin Court as contrasted with the rights and privileges granted to them by federal legislation must either run the risk of expensive litigation and temporary restraints on the exercise of their rights, or abandon those rights guaranteed to them by the federal Act under compulsion and coercion of the state law.

To confront both employers and employees with state and federal administrative regulation of their activities, which regulations are in many instances inconsistent each with the other, and the administration of which regulations are vested on the one hand in a single administrative agency, and on the other hand in an administrative agency divided as to functions and duties between the office of the General Counsel and the administrative body itself, with the remedies to be applied and the orders to be entered differing from each other either under the law or

dependent upon administrative discretion, would give rise to a situation in industrial relations affecting interstate commerce entirely contrary to the expressed policy of the United States. The industrial peace and stability envisaged by the federal policy cannot become a reality where a premium is placed upon the ability to guess which of forty-nine sets of rules will govern—those of each of the forty-eight States or those of the Federal Government.

It is, therefore, respectfully submitted that not only did Wisconsin lack the power to act in the particular way in which it did, but that it had no jurisdiction to act at all in the first instance, and that, under Article I, Section 8, and Article VI of the Constitution, the judgment is void for lack of jurisdiction.

III.

A State Cannot Compel Employees Engaged in a Labor Dispute With Their Employer to Cease and Desist From Concerted Work Stoppages or From Inducing Such Stoppages. Such Restraint of Basic Civil Rights Is Contrary to the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

In considering whether the judgment herein is violative of any constitutional rights under the Thirteenth and Fourteenth Amendments, a review of the full import of the restraint is of necessity the starting point. The state Board's order and the state Court's discussion of the order disclose the following:

1. The order is directed to the union and to the members of its bargaining committee. The union under Wisconsin law has no existence independent of its membership,—the membership is the union, and vice versa. (**Hromek v. Frei Gemeinde**, 238 Wis. 204, 209, 298 N. W. 587.) The Wis-

consin court pointed out that "whatever is forbidden to the union is forbidden to its members" (Decision at R. 113). The order, therefore, is directed to virtually all of the employees of the respondent corporation.

2. The order covers "doing any one of the things that by the Act constitutes an unfair labor practice" if it is "a concerted effort to interfere with production," excepting only a strike (Decision at R. 109). This comprehends all types of concerted activities short of a strike as defined by state law. (For criticism of apparent comprehensiveness of the order see dissenting opinion at R. 125.)

3. The order by its very language directs petitioners to cease and desist from any concerted efforts to interfere with production (a) by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours, or (b) engaging in any other concerted effort to interfere with production except by leaving the premises for the purpose of going on strike.

Bearing in mind that the excepted activity—a state-defined strike—carries with it the necessity of "continuous unemployment" until demands are met or compromised (Decision at R. 113), the net result of the order is to place petitioners in jeopardy of contempt proceedings for engaging in concerted withdrawals and for "arbitrarily" calling union meetings which result in, or are intended to result in interference with production, although for mutual aid and protection during the course of the labor dispute. The order also forbids refusals to report for work since that was one of the concerted activities engaged in by employees on the second shift who, after the first shift ceased work, did not report for work but attended the union meetings (R. 49).

It is not clear from the order or decision at what particular point a violation of the judgment will occur.

It appears that violation will occur should the individually named petitioners, or any other employees, "arbitrarily" call a union meeting or should they "induce" or participate in a work stoppage with intent to resume employment, without surrender of the disputed issue, failing settlement. Here it is the intent to return under such circumstances that places petitioners in jeopardy of contempt.

We believe it is a concept foreign to the principles of American law that such a quitting of employment with intent to return to work will subject employees to contempt proceedings. Yet it is on such slender thread that the employees' freedom depends in the instant case.

A. The order, judgment, and any statute upon which they may be based violate the Thirteenth Amendment to the Constitution of the United States.

The Thirteenth Amendment to the Constitution of the United States applies not only to commercial slavery, but embraces compulsory service "of whatever name and form and all its badges and incidents." **Bailey v. Alabama**, 219 U. S. 219, 241. The amendment also comprehends the "maintenance of a system of completely free and voluntary labor throughout the United States." **Pollock v. Williams**, 322 U. S. 4, 17.

It was pointed out in the **Pollock** case, supra (at p. 18), that where the laborer is obligated to continue his employment

> "there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social

value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms."

If, as stated above, the act of quitting cannot be made a component of a crime then surely such act of quitting cannot be restrained in civil proceedings. See **U. S. v. Hutcheson,** supra, for the converse of this proposition.

The above expressions of the Court are consistent with the dissenting opinion of Justices Brandeis and Holmes in the case of **Bedford Cut Stone Company v. Journeymen Stone Cutters Association of North America,** 274 U. S. 37, 65:

"If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude."

The Wisconsin Court relied on **Aikens v. Wisconsin,** supra, p. 41, and **Dorchy v. Kansas,** 272 U. S. 306, as its authority.

The **Aikens** case, as already pointed out, dealt with activit malevolently done for the sake of harm and without just cause. And the **Dorchy** case did not involve the right to strike, but involved only the application of a **criminal statute** to an officer of a labor union who had induced a strike for the illegal purpose of collecting a stale wage claim at a time when there was no other labor dispute between the union and the company. The issue

in that case did not involve a previous restraint, but the right of the state to punish for a crime.

There is a multitude of lower court decisions identifying the right to engage in concerted stoppages, and to concertedly withhold services, as protected rights within the Thirteenth as well as the Fourteenth Amendment to the Constitution of the United States. Among such decisions are the following:

Arthur v. Oakes, 63 Fed. 310;
Union Pacific Railroad Company v. Ruef, 120 Fed. 102;
Iron Moulders Union v. Allis-Chalmers Company, 166 Fed. 45 (1908);
Great Northern Railway Company v. Brosseau, 286 Fed. 414;
Stapleton v. Mitchell, 60 Fed. Sup. 51;
Alabama State Federation of Labor v. McAdory, 18 So. (2d) 810 (Ala., 1944);
Hotel & Restaurant Employees etc. v. Greenwood, 30 So. (2d) 696 (Ala., 1947);
In re: Porterfield, 168 Pac. (2d) 706 (Calif., 1946);
Ex Parte Blaney, 184 Pac. 892 (Calif., 1947);
Cohn and Roth Electric Co. v. Brick Layers et al., 101 Atl. 659 (Conn., 1917);
American Federation of Labor v. Reilly, 155 Pac. (2d) 145 (Colo., 1944);
Henderson v. Coleman, 7 So. (2d) 117 (Fla., 1942);
Pickett v. Walsh, 78 N. E. 753 (Mass., 1906);
Lindsay v. Montana State Federation, 96 Pac. 127 (1908);
National Protective Association v. Cumming, 63 N. E. 369 (N. Y., 1902).

In **Arthur v. Oakes**, supra, it was stated:

"One who is placed under such restraint is in a condition of involuntary servitude—a condition which

the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction."

The too pat answer to arguments identifying the right to strike or to engage in a concerted work stoppage with the liberty protected by the Thirteenth Amendment is that such amendment protects only the right of individuals and that combinations may be differently treated by the state. In the instant case the Wisconsin Court went back to a lower federal court decision of Judge Wilkerson who attained notoriety with his injunctions in the railroad strike cases of 1922 and who, in a case involving alleged boycotts and other activities in violation of the Sherman Anti-Trust Act, imposed a limited restraint on the right to strike based upon the theory of criminal conspiracy (Decision at R. 114).

In **National Protective Association v. Cumming,** supra, the New York Court of Appeals followed the classic dissent of Holmes, J., in **Vegehlan v. Guntner,** supra, saying:

"Whatever one man may do alone, he may do in combination with others provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act."

And in **Lindsay and Company v. Montana State Federation of Labor,** supra, the Montana Supreme Court stated (p. 130):

"There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If

an individual is clothed with a right when acting alone he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act."

See also Mr. Justice Black's dissenting opinion in **Milk Drivers Union v. Meadowmoor,** supra, at page 305, wherein it was stated:

"But Illinois cannot, without nullifying constitutional guaranties, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution, even though called a 'common law' conspiracy or a 'common law' tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy."

In none of this court's picketing decisions was the element of concert considered in treating the constitutional question involved.

The conspiracy theory "grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. * * * " Sayre, "Criminal Conspiracy", 35 Harvard L. R. 398, 427 (1922).

It would seem that in view of judicial and Congressional recognition of the legality of combinations of working men, and in view of the social and economic justification for such combinations, the theory of "conspiracy" as applied to concerted activities during the course of a labor dispute—particularly where such activities are car-

ried on by the employees directly involved, and their dispute is not extended by way of boycott or otherwise—is untenable and unrealistic.

To assert that the constitutional right inheres to the individual but that two individuals in concert cannot exercise such right is to empty such right of any content or meaning in present day industrial life. **American Steel Foundries v. Tri-City Foundries**, 257 U. S. 184; **National Labor Relations Board v. Jones & Laughlin Steel Corporation**, 301 U. S. 1; **Clayton Act**, 38 Stat. 78, 29 U. S. Para. 52; **Norris-LaGuardia Act**, 47 Stat. 70, 29 U. S. C. Para. 101-115; **National Labor Relations Act**, supra.

To say that one person may protest the conditions under which he works by withholding his services, but that he may not, through his labor organization, agree with others to exercise that right in concert, is to nullify not only the expressed policy of the federal government, but to make a sham of the protection afforded by the Thirteenth Amendment.

While it is conceivable that under certain circumstances concerted stoppages or refusals to report for work may lead to civil liabilities, forfeiture of certain employee rights, or criminal prosecution, nevertheless, as the exercise of a constitutional right they are not subject to prior restraint on the part of the state, absent "clear and present danger". **Schenck v. United States**, 249 U. S. 47, 52 (1919); **Thomas v. Collins**, 323 U. S. 516; **Stapleton v. Mitchell**, supra.

Giving to the Thirteenth Amendment the "hospitable scope" of its reasonable intendment, particularly in view of the firmly accepted public policy expressed in the federal statutes and cases heretofore cited (see **U. S. v. Hutcheson**, supra), it cannot today be denied that employees, acting either singly, or in concert, or by agree-

ment or through their union, have the absolute right to quit their employment, particularly during the course of a labor dispute. Wisconsin, however, while recognizing that absolute right to quit (Decision, R. 114), maintains that it may restrain a concerted quit, **if the quit is for a stated interval of time and accompanied by an intent to return.**

So if today petitioners should announce to respondent company that on the morrow they will walk out for the purpose of asserting economic pressure to attain their demands, but will report for work the following day, even if not successful and without abandoning their demands, the violation of the judgment will occur at the moment that the employees leave or refuse to report simply because of their intent to return under the circumstances. The employees are, therefore, prohibited from leaving their employment if such leaving is for a previously fixed period of time and is conditioned upon an intent to return.

The employer, of course, always has it within his means to prevent fulfillment of the intent to return, since he is under no obligation to either settle the dispute nor to offer re-employment, providing there is no discrimination in violation of the National Labor Relations Act. Realistically speaking then the "intent" which gives rise to the violation of the judgment is no more than a "hope."

It is submitted that under the Thirteenth Amendment to the Constitution of the United States the right of employees to leave their employment cannot be restrained by the state because of their hope of returning at a fixed time if the employer will so permit.

B. **The order and judgment and any statute upon which they may be based violate the Fourteenth Amendment to the Constitution of the United States.**

The order and judgment direct the individual petitioners, as well as the union and its members, to cease and

desist from inducing work stoppages; and from arbitrarily calling union meetings for the purpose of interfering with production. This previous restraint upon such activities is in violation of the basic rights assured to petitioners under the Fourteenth Amendment to the Constitution of the United States, in that it abridges the exercise of the right of free speech, and public assemblage, and deprives them of a basic civil liberty: that of strengthening their employment rights and economic opportunities by combining with their fellow workmen.

In the cases of **Wolf Packing Company v. Court of Industrial Relations**, 262 U. S. 522, and 267 U. S. 552, this Court struck down a statute of the State of Kansas which prohibited employers from suspending operations, and employees from leaving their employment, while their wage dispute was being adjudicated by a state tribunal. It was held that both provisions were in violation of the Fourteenth Amendment, in that they curtailed the right of the employer and of the employee to contract about their affairs, which right was a part of the liberty of the individual guaranteed by the due process clause of the Fourteenth Amendment.

In the **Greenwood** case, supra, the Alabama Court very aptly pointed out that since the right of working men to picket in the course of a labor dispute is protected by the Constitution of the United States even where there is no strike, then surely the strike itself in the course of such dispute must be so identified.

Similarly, in **American Federation of Labor v. Reilly**, supra, the Colorado Court held:

> "Notwithstanding the contrary contention of counsel for defendants, we think the decisions indicate that the constitutional guarantee of assembly to the people is not restricted to the literal right of meeting

together 'to petition the Government for a redress of grievances.' See **Hague v. C. I. O.**, supra; **DeJonge v. Oregon**, 299 U. S. 353; **Herndon v. Lowry**, 301 U. S. 242; **Murdock v. Penn.**, 319 U. S. 105; **State v. Butterworth**, 104 N. J. L. 579, 142 A. 57.

"While these decisions may not as unequivocally place the right of workmen to organize and operate as a voluntary labor association within the area of the guarantees of assembly and free speech as the Thornhill case locates peaceful picketing within the perimeter of the latter, their purport seems to us to support the conclusion of the trial court that sections 20 and 21 transgressed constitutionally by denying to unincorporated labor unions, and their individual members, any right to assemble and function as such in the promotion of their common welfare by lawful means."

That provision of the order which prohibits the inducing of a work stoppage directly limits the exercise of the right of free speech, and that part of the order which prohibits the "arbitrary" calling of union meetings is a direct restraint on the right of assemblage. Additionally, labor union activities in their totality, when engaged in by lawful means and for the lawful objective of attaining collective bargaining demands, have been held to come within the protection of the Fourteenth Amendment. The Fourteenth Amendment protects the right to assemble, discuss and persuade in matters relating to work stoppages or refusals to report for work, or relating to collective bargaining and labor disputes just as it applies to religious, political or other activities. **Senn v. Tile Layers Union**, 301 U.S. 468; **Hague v. C. I. O.**, 307 U. S. 496; **Snyder v. Milwaukee**, 308 U. S. 147; **Thornhill v. Alabama**, 310 U. S. 88; **Thomas v. Collins**, 323 U. S. 516.

In the **Thomas** case, supra, it was pointed out that the requirement of registration before making a public speech

on labor union matters, or as a condition precedent to solicitation of membership was "incompatible with the exercise of the rights of free speech and free assembly."

It was further pointed out that

> "lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers."

The court went on to say:

> "The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede."

And Justice Jackson, in a concurring opinion in this same case, said:

> "This liberty (peaceable assemblage) was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

See also **DeJonge v. State of Oregon**, 299 U. S. 353, and **Hague v. Committee of Industrial Organization**, supra.

The **Thomas** case identified the right of solicitation with the right of free speech and other rights assured by the Fourteenth Amendment. It was held that the speech and solicitation in that case, being part of a campaign for

union members, was an activity expressly guaranteed by the National Labor Relations Act, which Act included within its scope "whatever may be appropriate and lawful to accomplish and maintain such organization."

So here, the maintenance of the union of the employees of the respondent corporation, in the judgment of those employes, required the stoppages herein involved.[14] Those employees as members of the union expressly authorized thir officers to call such stoppages. The restraint, therefore, is not directed to "strangers" who for malicious reasons seek to induce a work stoppage, but to all employees who, having valid reasons, wish to assert their economic pressure. The expression of that desire or the "self-inducement" is a protected right under the Fourteenth Amendment. To say, as Wisconsin has said, that the employees through their chosen representatives may not induce a work stoppage is in effect to say that they may not discuss their grievances because such discussion may lead to the conclusion that the only method of redress is to cease employment.

The mere fact that the union meetings conflict with the running of a plant of a private employer is no basis for any injunctive order, except in reasonable apprehension of danger to an organized government. **Herndon v. Lowry,** 301 U. S. 242, 258. The only danger shown here is that of economic injury to the employer. This is not a substantive evil of such magnitude as to justify a limit to the constitutional rights which petitioners exercise. **Bakery and Pastry Drivers, etc. v. Wohl,** 315 U. S. 769, 775.

Since the right of lawful assembly and of free speech is the highest kind of right, such rights may only be curbed

[14] Anthony Doria, union representative, testified that "the plan was to be able to have such control that when anything threatened our security in the plant we would be in a position to bring the members together to counteract acts against our union" (R. 48).

when they are abused. This court has held in the case of **Near v. Minnesota**, 283 U. S. 697, that the appropriate remedy for such abuse is punishment, but that an injunction seeking to prevent the exercise of the right is violative of the Fourteenth Amendment.

Here the State imposed a previous restraint on rights assured by the Fourteenth Amendment, without any showing of clear and present danger. It is submitted that the judgment cannot stand.

Conclusion on the Thirteenth and Fourteenth Amendments.

The Thirteenth and Fourteenth Amendments have been treated separately as applicable to the restraint in the instant case. What is really involved here, however, is a composite of basic civil rights and liberties which fall within the protection of both Amendments considered together. (See **47 Columbia Law Review 299; 42 Columbia Law Review 702, 704.**) That composite of rights embraces the privilege of employees to cease their employment, or to refuse to report for employment by concert of agreement or action; to express their opinion on the necessity of doing so, and to urge, induce, or persuade their fellow employees to do so; to call and attend union meetings off the premises of the employer, even though such meetings take place during working hours; and to do all other things necessary to make their organization effective, and to prevail in collective bargaining during the course of a labor dispute. Particularly is this so since there is no suggestion here that the exercise of such rights and liberties presents a clear and present danger to the community. And while such activities are necessarily intended in part to interfere with production, and such interference will normally result, just so long as the activities are not attended by violence, breach of the peace, or other concomitants which

would under some circumstances permit a restraint to preserve superior or cognate rights, there is no basis for the restraint herein imposed.

It is submitted that the right of employees to cease work collectively, and the incidents thereof, such as inducing such action and attending union meetings, as was the case here, may be considered either as an exercise of the right to earn a livelihood, the right by agreement to dispose of labor, the right of assembly, the right of free speech, the right to be free from involuntary servitude, or a composite of all such constitutional rights, privileges and immunities under the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Therefore, the judgment herein, and any statute upon which it is purportedly based, are void.

IV.

Section 111.06 (2) (e) of the Wisconsin Statutes and the Order and Judgment, Insofar as They Are Purportedly Based Upon Such Provision, Are Unconstitutional and Void, Because Contrary to and in Violation of the Fourteenth Amendment to the Constitution of the United States.

At page 49 hereof the provisions of Section 111.06 (2) (e) of the Wisconsin Statutes are set forth, and it is pointed out that although in the state's Brief opposing Certiorari, the state now claims that this section is not involved in the case, nevertheless, the Wisconsin Court did sustain the order, in part at least, on this section.

We have previously argued in this brief that this section of the statutes is of no avail to the state as justification for depriving petitioners of rights secured to them under the National Labor Relations Act, and that the re-

straint, regardless of what section of the statutes it is based on, is in violation of the Thirteenth and Fourteenth Amendments. The present argument is directed to the point that Section 111.06 (2) (c) on its face, and as applied in this case, is unconstitutional under the Fourteenth Amendment because of the majority-minority rule therein embodied.

This point was previously urged to this court in the case of **Hotel and Restaurant Employees International Union v. Wisconsin Employment Relations Board**, 315 U. S. 437. It was not there considered by the court in arriving at its decision because it appeared to this court that the judgment in that case was not based upon such section, but rather upon acts of violence and breaches of the peace. Since the Wisconsin Court in the instant case clearly relied upon such statute on its face, above and beyond any consideration of unlawful acts similar to those in the **Hotel and Restaurant Employees Case**, supra, the question is now squarely before this court as to whether or not the majority-minority device as a test of legality of concerted activities represents valid classification and discrimination under the equal protection clause of the Fourteenth Amendment to the Constitution.

States may make proper classifications when enacting laws in order to subserve public objects, but such classification, as has been pointed out by this court,

> "must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." **Connolly v. Union Sewer Pipe Company**, 184 U. S. 540.

In the instant case the classification is indefinite and lacks any semblance of rationality. It is not based upon geographical location, public health, safety, or morals,

density of population, nor nature of the occupation. It has no relationship to the type of business, to the location of the plant or establishment, nor to whether the activities occur in an industrial or residential section, in the heavy-traffic area, or light-traffic area, or in an adequately policed area, or not.

It is not even based on numbers, but solely on what is or is not a majority in a particular case. The law provides that in one situation two may engage in concerted peaceful activities if they comprise a majority; while in another situation 5,000 may not engage in the same peaceful activities if they do not comprise a majority or, if a majority did not approve by secret ballot. A majority in a small plant may be a minority in a plant employing thousands. A majority in a slack season very quickly becomes a minority in the busy season. Arithmetically, the majority may be as little as two in a small establishment, and may rise into the hundreds of thousands in the large industrial enterprises in this country. The same is true of minorities.

It is difficult to see what there is inherent in the mere taking of a secret vote or the failure to take such vote, or in the acquiescence by a majority to strike, which in one instance presupposes that the activities will not present danger to the lives and property of citizens, and which in the other instance assumes that such danger will arise.

Wisconsin has in effect said that while the activities per se are not unlawful if licensed by a majority and secret ballot, they become unlawful in the absence of such majority license or ballot. Yet, in each situation there is an interference with production and it seems rather obvious that in the one situation where the interference results from majority action, the resulting economic harm would be much greater than in the prohibited situation where interference results from minority action.

Nor can the majority-minority rule be construed as a protection of an unwilling majority, since all employees, as individuals, do have a right under statute and decision to engage in or refrain from such activities, regardless of the desires of their co-employees. (National Act, Section 7; Wisconsin Act, Section 111.04.)

In addition, the way and manner in which the majority-minority rule is to be applied is attended by obscurity. There is no statutory definition of the way and manner in which this vote shall be conducted, the place at which it shall be conducted, or by whom it shall be conducted. Apparently, if the employees have designated a collective bargaining representative, such representative may conduct the vote, but if a majority of all employees in the unit fail to attend and cast a favorable ballot, even though it is the unanimous decision of those present at the meeting, there has been no compliance with the law. Presumably if employees are not represented by a collective bargaining representative, the most aggressive in their group will have to assume the cost of financing the meeting and mechanics of polling all employees. And if all go out wihout a secret ballot vote, the law has been violated.

It is with such vague, ambiguous, and illogical requirements that the petitioners herein were compelled to comply, and failure to comply was found, although both by oral and secret ballot the preponderant majority of all employees within the bargaining unit approved of the activities and engaged in them.

That a majority-minority rule does not provide a valid basis for state action in matters growing out of a labor dispute was held in **American Federation of Labor v. Swing**, supra, involving the protected right to picket. Similarly in strike and other concerted activity cases, it has been held by a number of lower courts that the majority-minority rule affords no valid distinction for state

action. **Stapleton v. Mitchell**, 60 Fed. Supp. 51; **Alabama Federation of Labor v. McAdory**, 18 So. (2nd) 810, 827 (Ala., 1944); **American Federation of Labor v. Bain**, 106 P. (2) 544, 555 (Oregon, 1940).

In the **Stapleton** case, supra, a special three-Judge Federal Court had before it the question of the validity of a statute of the State of Kansas, which conditioned strikes, walkouts, or cessations of work upon majority-vote authorization. The court held that:

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

In the **Alabama Federation of Labor** case, supra, a provision requiring majority authorization prior to strike was declared invalid upon the basis that individuals have the right to strike for legally justifiable purposes, and that such right rests in the minority, as well as in the majority. The court concluded as follows:

> "Reduced to its last analysis, therefore, the question arises as to the reasonableness of a regulation making the right to strike dependent upon the will of others who may not in any manner be connected with, or interested in, the welfare of the minority group. Indeed these other employees may not belong to or believe in a labor organization."
>
> . . . . . .
>
> "We are well convinced that a prohibition to strike placed upon a minority group unless sanctioned by secret ballot or others who are without interest in their

welfare, is an unreasonable and arbitrary restraint, and must be stricken down."

To similar effect is the decision of this court in the case of **Truax v. Raich**, 239 U. S. 33 (1915), in which state legislation limiting the proportion of aliens which might be hired in business establishments was declared invalid. The court first identified the right of individuals to follow their calling as "the very essence of the personal freedom and opportunity that it was the purpose of the Amendment (Fourteenth) to secure." It rejected the argument that "the employment of aliens, unless restrained, was a peril to the public welfare," and then dealt with the question of whether or not the statute embodied reasonable classification based upon the ratio fixed. The court said (p. 43):

> "But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. (Citing cases.) If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; * * * The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to

support the enactment, for, as we have said, it relates to every sort."

So here, if the state may restrict the right to concerted activities to a majority of employees, regardless of the business involved or any other attendant circumstances, the classification can be sustained only if it is assumed that the state has the right to ban all concerted activities. If a majority-minority classification is reasonable, then so would a 75 per cent—25 per cent, or a 90 per cent—10 per cent, or a 100 per cent—0 per cent, or a total prohibition. Therefore, to sustain the majority-minority principle would be in effect to sustain the right of a state to prohibit all concerted activities for the purpose of mutual aid and protection, the limitation herein having no regard to either the nature of the activity nor the objective sought.

The requirement of a majority vote by secret ballot is no different than a requirement of prior license, the only distinction being that in one instance the license depends upon the whim of the state or city, acting through its licensing official, and in the other it depends upon the whim of a perhaps too docile majority. (In the instant case, of course, the court relied only upon the technicality of failing to vote by secret ballot, and failure to use the term "strike," since it is conceded that the activities were in fact sanctioned by virtually all in the plant.) For this reason there is no distinction between the majority-minority, secret-ballot rule approved by the Wisconsin Supreme Court in this case, and those cases of this court which have invalidated state action requiring licenses for public assemblage or for distribution of religious literature or union organization. **Lovell v. Griffin**, 303 U. S. 444 (1938); **Hague v. C. I. O.**, supra; **Schneider v. State of New Jersey**, 308 U. S. 147; **Cantwell v. Connecticut**, 310 U. S. 296; **Largent v. Texas**, 318 U. S. 418 (1943); **Murdock v. Pennsylvania**, 319 U. S. 105 (1943); **West Virginia v.**

Barnette, 319 U. S. 624 (1943); **Follett v. McCormick**, 321 U. S. 573 (1944); and **Thomas v. Collins**, supra.

In the **Follett** case, supra, the court said:

> "* * * We fail to see how such a tax loses its constitutional infirmity when exacted from those who confine themselves to their own village or town and spread their religious beliefs from door to door or on the street. The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker."

Wisconsin has here sought to substitute principles of arithmetic for principles of morality. Legislation of this type may very well be the opening wedge to exploitation of minority groups in this country similar to that demonstrated by the recent tragic history of Europe where minority, racial, political and economic groups, were mercilessly punished and deprived of all human rights.

CONCLUSION.

These proceedings have come to the attention of this Court, primarily because of the interpretation of the term "strike" by the Wisconsin Supreme Court. As a result of misinterpretation, Wisconsin has declared to be unlawful and subject to restraint those concerted activities firmly protected by the federal law and Constitution, and has rendered utterly meaningless the protections so afforded.

The type of strike carried on here by petitioners is one that should be encouraged, as compared to the long, protracted, full-time strike. By its very nature, it causes far less economic hardship on all parties: the employee, the employer, and the public. For the employee it makes pos-

sible regular, although reduced, pay-checks; for the employer it has the virtue of relatively continuous production; for the public, it not only makes available the product manufactured, but also shields against widespread hardship caused to the community by the continuous unemployment of substantial numbers of men.

A short-time strike or stoppage provides to the working man the opportunity to secure for himself over a longer period what he may not be able to attain over a shorter continuous period financed out of his reserves rather than out of current income. In this way the working man is placed on a more equal bargaining basis by removing the need of individual financial resources to support his demands at the bargaining table.

And while there may be difference of opinion on this appraisal, depending upon one's economic or social philosophy, the fact remains that the activities, both by their nature and in their objective, fall within that area of permissible conduct recognized and guaranteed by the federal law and Constitution.

The restraint imposed by the State of Wisconsin, which prohibits the employees from engaging in concerted efforts to interfere with production by merely leaving the premises in an orderly fashion, or by refusing to enter upon the premises for the purpose of attaining legitimate bargaining demands or to induce such action, unless previously ratified by a majority secret ballot vote to go out on a state-defined strike, and unless the peaceful leaving or refusal to enter upon the premises is continued until the labor dispute is resolved one way or the other, is a flagrant violation of rights of petitioners.

Petitioners again emphasize that the employer here still has the right to take whatever action he deems appropriate, and which may be permissible under the law. His sue-

with him, nor from cooperating with representatives of at least a majority of his employes in a collective bargaining unit, at their request, by permitting employe organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. Such authorization of an all-union agreement shall be deemed to continue thereafter, subject to the right of either party to the all-union agreement to request the board in writing to conduct a new referendum on the subject. Upon receipt of such request by either party to the agreement, the board shall determine whether there is reasonable ground to believe that there exists a change in the attitude of the employes concerned toward the all-union agreement since the prior referendum and upon so finding the board shall conduct a new referendum. If the continuance of the all-union agreement is supported on any such referendum by a vote at least equal to that hereinabove provided for its initial authorization, it may be continued in force and effect thereafter, subject to the right to request a further vote by the procedure hereinabove set forth. If the continuance of the all-union agreement is not thus supported on any such referendum, it

cess or failure in the use of his generally superior economic power is no more pertinent to a determination of the legitimacy of the activities than is the petitioners' success or failure.

If the State should be permitted in this case to throw its weight on the side of the employer, in the circumstances here involved and in the manner in which it has sought to do, then all talk of "labor's Magna Charta" will become mere idle prattle and the Federal Government will default to the whims and caprices of the State, its decisional, legislative, and constitutional declarations of policies and rights.

It is respectfully submitted that Article I, Section 8, and Article VI of the Constitution of the United States, from which the National Labor Relations Act draws its validity and supremacy, and that the Thirteenth and Fourteenth Amendments to the Constitution firmly shield against limitation or previous restraint by the several States the right of working men to cease their work collectively in furtherance of collective bargaining demands during the course of a labor dispute; although by such acts injury or inconvenience may result to a private employer. This is so whether such right is considered that of free speech, assembly, freedom from involuntary servitude, or the fundamental right to engage in concerted activities for mutual aid and protection. The State action here, therefore, and any State statute on which it is purported based are unconstitutional and void.

Respectfully submitted,

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SAUL COOPER.

shall be deemed terminated at the termination of the contract of which it is then a part or at the end of one year from the date of the announcement by the board of the result of the referendum, which ever proves to be the earlier date. The board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employe of such employer, and each such all-union agreement shall be made subject to this duty of the board. Any person interested may come before the board as provided in section 111.07 and ask the performance of this duty. Any all-union agreement in existence on May 5, 1939, and renewed or amended continuously since that time shall be deemed valid and enforeible in all respects.

(c) 2. No petition by an employer for a referendum to determine whether an all-union agreement is desired by his employes shall be entertained by the board where such employer has a contract or is negotiating for a contract with a labor organization which has been duly constituted as the bargaining representative of his employes unless such employer has made an agreement with such labor organization that he will make a contract for an all-union shop if it is determined as a result of the referendum held by the board that his employes duly approve such all-union shop.

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board.

(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargain-